SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF VENTURA

SIERRA CLUB, a public benefit corporation, ENVIRONMENTAL DEFENSE CENTER, a California public benefit corporation, and ENVIRONMENTAL COALITION, a California public benefit corporation,	**Case No.: 56-2011-00401161**
Petitioners,	**ORDER ON PETITION FOR**
v.	**WRIT OF MANDATE AND**
CITY OF OXNARD, et al.,	**PEREMPTORY WRIT OF MANDATE**
Respondents.	
ITO FARMS, INC., et al.,	
Real Parties in Interest.	

This matter came on regularly for hearing before the Court on August 3, 2012, on petition for writ of mandate, the Honorable Glen M. Reiser, judge presiding. Petitioners Sierra Club, Environmental Defense Center and Environmental Coalition (collectively "petitioners') appeared through their attorneys, Karen Kraus and Linda Krop of the Environmental Defense Center. Respondent City of Oxnard appeared through its Assistant City Attorney, Stephen M. Fischer. Real Parties in Interest Ito Farms, Inc., Hearthstone Homes, Inc., Dave O.White, Trustee of the Realty Services Defined Pension Plan, Frank E. White, Trustee of the Frank E. White Sole Proprietorship Defined Benefit Plan, Ruby Ishimoto, Ruby Katsuda, Ruby Katsuda Trust, Ritsuo-Kazuko Ito Trust, South Shore Land Co., LLC, Plum Vista, L.P., Allen and Marilyn

Camp, Ritsuo and Kazuko Ito, Sachiko Ito, Raymond Swift, Ritsuo and Kazuko Ito, Trustees, Sachiko Ito, Trustee, John M. Katsuda, James Katsuda, Ruby M. Katsuda 1992 Trust, Kenneth K. Katsuda and Ruby Ishimoto, Trustee, appeared through their attorneys Tim Paone and Kathryn J. Paradise of the law firm Cox, Castle & Nicholson. Real Parties in Interest Marathon Land, Inc., Deardorff-Jackson Co., Yonit Levy Trust, Silver Star Enterprises, Callens Ranch, Beasley Ranch Partnership and Milligan Ranch appeared through their attorney Mark W. Steres of the law firm McKenna Long & Aldridge LLP.

The Court received and considered the entire administrative record, heard oral argument by all parties, took judicial notice of the matters so requested, and reviewed the videotapes of the multiple administrative hearings linked in the administrative record. The matter was taken under submission, and this notice of ruling follows.

The Land Use Applications

In June 2003, Hearthstone Homes Oxnard LLC ("Hearthstone") filed a land use permit application with the City of Oxnard ("the City") to amend the City's general plan and a then-existing specific plan (Administrative Record ["AR"] 13783).[1] The application proposed to build a master planned residential/commercial mix of approximately 317 unincorporated acres north of Hueneme Road, in an area generally known as "Ormond Beach." (AR 13777.) As envisioned in that application, "[t]he remaining area south of Hueneme Road would remain [agricultural as previously] designated."

In November 2003, a project information questionnaire was submitted by Southland Sod Farms ("Southland Sod") to the City seeking development of the 375 acres of land immediately south of Hueneme Road, which land was proposed for "business park" and "light industrial" development. (AR 3639, 3987, 13808, 14100, 25815-25819.) The formal Southland Sod application for the development of the southern 375 acres was submitted on July 6, 2005,

[1] A specific plan is a legislative enactment that implements the development policies of the city or county's general plan for all or part of the area covered by the general plan. (Gov. Code § 65450.) It is subject to extensive public review and comment, review by other affected local agencies, and approval by the planning commission and the agency's legislative body; in this case, the Oxnard City Council. (Gov. Code §§ 65351–65356.) *South Sutter, LLC v. LJ Sutter Partners, L.P.* (2011) 193 Cal.App.4th 634, 668.

seeking a "new" specific plan for that acreage and a change to "industrial" zoning. (AR 25835-25841.)

Both specific plan areas are currently in unincorporated portions of the County of Ventura, but fall within the sphere of influence of the City.[2] (*Id.*) In its 2020 general plan adopted in 1990, the City had both specific plan areas combined into a single proposed specific plan for Ormond Beach (AR 3984-3985), thereby necessitating both a proposed general plan amendment and a specific plan amendment to accommodate the proposals. (AR 1098, 3632, 13783.) The two proposed specific plan areas are divided by Hueneme Road—"NSP" is north of Hueneme Road; "SSP" is south of Hueneme Road. (AR 741-742.)[3]

The 2007 Draft EIR

In May 2007, through its consultant, the City issued a single draft environmental impact report ("DEIR") on the two combined adjacent specific plans. (AR 740.) There are ten current property owners within the NSP (AR 849, 3983) and six current property owners within the SSP. (AR 850, 3984.) The NSP is currently entirely in row crop agricultural production (primarily strawberries and flowers); plus Edison utility transmission lines running along its northern and western perimeters. (AR 858.) The SSP likewise has agricultural (primarily sod) and Edison

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[2] A sphere of influence is defined as "a plan for the probable physical boundaries of a local service area, as determined by the [local agency formation] commission." (Gov. Code §56076.) In this sense, a "sphere of influence" is a prospective measure, charting what a city's or district's boundaries might be at some future point. *Community Water Coalition v. Santa Cruz Co. LAFCO* (2011) 200 Cal.App.4th 1317.

[3] The two proposed specific plans are confusingly entitled "South Shore Specific Plan" for the northernmost of the two specific plan areas; and "South Ormond Beach Specific Plan" for the southernmost of the two specific plan areas. (AR 745.) Because the names are similar, this Notice of Intended Decision will differentiate the two as "the northern specific plan" or "NSP" (South Shore Specific Plan) and "the southern specific plan" or "SSP" (South Ormond Beach Specific Plan).

The DEIR and its progeny refer to the two specific plan proposals as the "Northern Subarea" and the "Southern Subarea." (See, e.g., map at AR 741-742.) Apparently no one has chosen to differentiate the two specific plan areas by use of their direct acronyms, "SS" for "South Shore" and "SOB" for "South Ormond Beach."

utility uses. The SSP, for point of reference is virtually adjacent on its southeast perimeter to the Naval Air Station at Pt. Mugu. (AR 859, 3826-3829.)[4]

The NSP proposed to develop most of its acreage (74.8%) for residential use including a servicing park and schools[5], with some commercial and "light manufacturing" uses (13.1%) and a proposed open space/water feature ("lake") along Hueneme Road. (AR 743, 1112.)[6] The SSP proposed to develop commercial and "light" industrial uses on the 56.9% of land immediately south of Hueneme Road, with continued open space and agricultural uses approaching the beach. (AR 744, 746.) The DEIR proposed that the southernmost 220 acres of the SSP *not* be annexed

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[4] If the SSP is not immediately adjacent to active military operations at Pt. Mugu, it is literally a "stone's throw" distance, with the military base perimeter established at Arnold Road. The claim in the land use analysis of the DEIR that the naval base is "approximately" three miles away from the site (AR 1096) is simply wrong, and misleading, and possibly refers to the naval operations command center.

The Department of the Navy ("Navy") advised the City in late 2005 that the DEIR needed to specifically address the various Navy missions: "**[D]ue to the importance and size of this project and its proximity to NBVC, that the DEIR fully evaluate all potential impacts to and from NBVC. It is imperative a project of this size and scale be compatible with our national defense mission.**" (AR 14315-14316.) Among the missions cited by the Navy in 2005 which needed to be analyzed in the DEIR to ensure land use compatibility included support of fleet aircraft; Naval Air Systems Command Weapons Systems Research; development, testing and evaluation of weapons systems; and use by reserve squadrons. (*Id.*) Other than through reference to aircraft noise decibel levels, however, the subsequent DEIR, RDEIR and FEIR all treat the nearly-adjacent naval air station as non-existent in terms of land use compatibility discussion.

[5] The NSP applicant's *continued* depiction of a high school within that proposed specific plan boundary (e.g., AR 7538—November 2009) is a fiction, the high school district having rejected the site in September 2005 due to its size and proximity to the existing high voltage Edison power lines and a proposed high pressure natural gas pipeline. (AR 14236, 20068 [LAFCO].) The anticipated result, as noted in the applicant's brief, would be substantially more residential development. (AR 398; NSPOB, at 5.)
The environmental documents, however, assess impacts at only 1283 dwelling units, not the 1545 residential units later approved by the City, a 20.42% increase. (See, e.g., AR 9515.) When the city mayor asked about the reality of the high school portion of the project going forward at the time of EIR certification in 2010, the city manager misstated the record to the city council and advised that "[the NSP] has not been eliminated from [the school district's] consideration as a potential site." *Cf.*, http://oxnard.granicus.com/MediaPlayer.php?view_id=39&clip_id=1298 at 51:55-52:03 [see fn. 12, *infra*]; AR 20068, where LAFCO stated three months earlier: "**The FEIR does not explain why the project still proposes a 56-acre high school after staff from the Oxnard Union High School District has indicated that the District has no plans or intentions for a high school in or near the project site.**"

[6] Map renderings of the proposed developed portions of the NSP and the SSP can be found through the administrative record, an example of which can be found in the RDEIR at AR 3990-3991.

to the City through LAFCO (AR 747), in anticipation of its potential sale to the California Coastal Conservancy or some other trustee agency for avian wetlands use. (AR 1103, 3643.)

According to the DEIR, the NSP as proposed would take 322 acres of prime farmland out of production. (AR 749.) The SSP as proposed would take 220 acres of prime farmland out of production. (AR 750.)

Project alternatives studied in the DEIR included increasing the residential development density in the NSP (alternative 1); turning the SSP into residential development and even further increasing the residential development density of the NSP (alternative 2); the mandatory "no project" alternative (alternative 3); and finally, simply taking 350 acres of the specific plan areas out of current agriculture and dedicating them to "resource protection" (alternative 4). No alternative was studied in the initial DEIR which adopted the proposed uses in whole or in part but *reduced* the density or breadth of the proposed developments. (AR 753-754.)

The DEIR determined there to be potentially significant impacts of the proposed specific plan developments in matters of water resources, air quality, agriculture, noise and aesthetic/ visual impacts, which significant impacts could not be mitigated to levels of insignificance. (AR 755-759, 799.)

The DEIR found that the remaining potentially significant impacts, including surface water runoff impacts to down-gradient "sensitive estuary and marine environments"; impacts to the native vegetation at Ormond Beach through the importation of non-native species; and direct impacts to local and migratory birds including the state endangered peregrine falcon, the federally threatened snowy plover (including nesting), and the state and federally endangered California least tern (including nesting), could be mitigated to levels of insignificance. (AR 768-773, 812-818.)

From the NSP, surface water runoff primarily flows into the Oxnard Industrial Drain ("OID"), originally built by the Oxnard brothers to drain industrial effluent and fluid. (AR 909-911.) The OID, which contains DDT and other toxic contaminants (AR 915-917) pours into the Ormond Beach Estuary ("Lagoon"), an area of "sensitive biological resources." (AR 912.) From the SSP, surface waters flow into the Oxnard Drain [*not* the OID], which carries surface water

runoff south into the Mugu Lagoon (AR 914; see map at AR 4232), another estuarine system of acknowledged biological value.[7]

The NSP soil is contaminated as evidenced by elevated hydrocarbon readings (AR 960-961), and the DEIR was concerned with treating those contaminants, as well as possible "increased mobilization of contaminated sediments due to increased runoff to the Oxnard Drain from the new development, ultimately impacting Mugu or Ormond Beach lagoons." (AR 960.) The specifics of the SSP soil and cultivation history were "unknown" at the time of the DEIR beyond a "Phase I" assessment "indicative of [possible] soil contamination," and the DEIR was likewise concerned with contaminant transport to Mugu Lagoon. (AR 972-974.) The DEIR proposed mitigation of the impacts of the proposed developments upon their estuarine receptors to levels of insignificance. (AR 1077-1078, 1083.)

> The DEIR described the biological context of the specific plan projects as follows:
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> The Study Area adjoins Ormond Beach and Mugu Lagoon located on NBVC-Pt. Mugu, two large, habitat-rich sensitive areas. The species richness, high biological diversity, and significant biological, aesthetic and ecological values of these two areas are extensively documented. Numerous special-status plant and wildlife species have been documented within the State Coastal Conservancy wetland restoration Study Area for Ormond Beach, which includes NBVC-Pt. Mugu (WRA, 2005). These areas are considered of particular combined value due to their relatively significant size, connectivity to each other and to upland open space areas, and their relatively undisturbed, high quality habitats. **The two systems represent one of the largest and most important coastal wetland, estuarine, and dune complexes remaining in Southern California.**" (AR 1044.) (Emphasis added.)

At that point, however, the DEIR made a critical biological distinction between the NSP and the SSP:

> "The Southern Subarea has higher habitat value than the Northern Subarea because it has uninterrupted connection with sensitive habitats at Ormond Beach, and the sod farms provide better habitat for birds than the row crop fields." (AR 1049.)...

[7] There is no hydraulic continuity, at least in terms of surface flow, between the specific plan areas and the nearby Halaco proposed "Superfund" site, which contains radioactive wastes and high levels of contamination (AR 917-918). The DEIR observed that no beneficial uses are made of the shallow perched groundwater in the area (AR 921).

"The Southern Subarea has greater bird use and diversity of bird species than the Northern Subarea due to its larger area and closer proximity and connectivity to Ormond Beach. Birds observed along the Oxnard Drain channel at the southern end of the Southern Subarea and the wetlands on the south side of the drainage include mallard, American coot, snowy egret, great egret, white-faced ibis, greater yellowlegs, black-necked stilt, dunlin, and least/western sandpiper."

"In some respects, the drainage ditches and sod farms in the Southern Subarea provide similar habitat value to wildlife as the historic marshes and grasslands; however, the sod farm and drainage ditches are disturbed on a regular basis and are subject to a high degree of human activity so they provide lower habitat value than natural systems. Local bird experts, the U.S Fish and Wildlife Service, and California Department of Fish and Game concur that the Study Area, although in cultivation, also provides high habitat value for bird species (Tetra Tech, 2002; Pereksta, 2005; WRA, 2005; CH2MHill, 2004). The sod farm operation bears many similarities in function to a grassland habitat interspersed with freshwater wetlands. Most shorebirds are foraging on surface and subsurface invertebrates, while egrets, herons, and raptors feed on small birds and rodents found mostly on the edges of the Southern Subarea. A number of rare or uncommon species occur nearly annually, including Pacific golden plover, American golden plover, buff-breasted sandpiper, red-throated pipit, McCrown's longspur, Lapland longspur, and chestnut-collared longspur. In addition, the [SSP] fields are used regularly by migrating and wintering species such as black-bellied plover, horned lark, and savannah sparrow, Belding's savannah sparrow, a state-listed endangered bird, has been sighted on or immediately adjacent to the Southern Subarea (Pereksta, 2005; USFWS,2005; BioSystems Analysis, 1993)." (AR 1053-1054.)

The DEIR noted that the SSP is a "foraging habitat for many shorebirds, passerines and raptors" which, upon emigration from the SSP site "are vulnerable to mortality by predation and unsuccessful competition for food and territory." (AR 1082-1083.) The DEIR further observed that construction activities risk adverse impacts to nesting on the immediately adjacent lands in possible contravention of the Migratory Bird Treaty Act. (AR 1084.) The DEIR nevertheless opined that such impacts could be rendered to levels of environmental insignificance through such mitigation measures as educational signs, "cat-proof" fencing, a landscaping "palette" with non-invasive plant species, mitigation through restoration or enhancement on some other site, working "if possible" during the non-breeding season, and distribution of educational pamphlets. (AR 1088-1093.)

In conjunction with the DEIR, the City hosted two Planning Commission hearings and a community "workshop." (AR 7444.) Many public comments to the DEIR were received by the City (see, e.g. AR 16166-17527), including critical objections in various categories from

multiple environmental groups (AR 16201-16206, 16787-17289, 18348-18354, 18400-18934, 18973-18985), the local Audubon Society (AR 16561-16568), California Native Plant Society (AR 18355-18357) the City's own Water Resources Division (AR 17594-17608), a member of the county Board of Supervisors (AR 17526-17527), Ventura County Resource Management Agency (AR 16609-16615), Southern California Association of Governments (AR 16491-16503), the State Coastal Conservancy (AR 17367-17371), and the United States Department of the Interior -- Fish and Wildlife Service ("USFWS") (AR 17392-17396.)

The USFWS analysis concluded that the proposed NSP and SSP project as mitigated would "result in take" of federally endangered bird species and "have potentially very significant effects on breeding success at this very important [endangered species] breeding site." (AR 17394-17395.)

The 2008 Recirculated Draft EIR

In light of the substance and breadth of the comments received, and perhaps other factors including its own disagreement with the DEIR findings as to water availability to the project, the City decided to rewrite portions and recirculate the entire DEIR. (AR 7255-7256.) The City's recirculated DEIR ("RDEIR") was issued in July 2008 (AR 3866), revising the earlier DEIR in terms of analysis of water resources, biological resources and air quality. (AR 3884-3885, 7255-7256.) In addition, in the alternatives section, the RDEIR added a project alternative that would result "in a lower level of development intensity" than the projects as proposed. (AR 3896, 7256.) [8]

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[8] Active military operations at the Navy base at Pt. Mugu were recalculated in the RDEIR executive summary to be "less than a mile" from the project site (AR 7258) [see fn. 4, *ante*], which is a true but again possibly misleading statement, because the scaled maps at AR 3339 and 4017 place the true distance at the closest point to what appears to be approximately 800 feet or less. The RDEIR itself, in its land use compatibility analysis, continued to call the Navy base "three miles east" of the project sites (AR 4291.) The Department of the Navy sought to correct the RDEIR with the observation that the project area is "adjacent to the NBVC perimeter." (AR 18185.)

It was not until the post-certification project approvals that city councilman Flynn asked the question: "Why is Pt. Mugu not being mentioned?" The councilman did his own post-certification research into current and anticipated naval air station activities as requested by the Navy back in 2005 (AR 14315-14316), and concluded that the NSP was not compatible from a land use perspective with continued naval operations in Ventura County.

The RDEIR perpetuated the "habitat value" distinction made in the initial DEIR between the NSP and the SSP. (AR 4233, 4237-4238.) The RDEIR specifically noted that the NSP project would result in direct loss of foraging habitat to the following "special status" avian species White-tailed Kite, Northern Harrier, Sharp-shinned Hawk, Cooper's Hawk, Ferruginous Hawk, Merlin (falcon), Peregrine Falcon, Long-billed Curlew, Mountain Plover, Short-eared Owl, Loggerhead Shrike, California Horned Lark, Tri-colored Blackbird and Burrowing Owl, plus indirect impacts to the Western Snowy Plover and California Least Tern. (AR 4267-4270). The RDEIR noted that the SSP project would also, in addition to the above, result in direct loss of foraging habitat to the following "special status" avian species: American Bittern, Bald Eagle, Light-footed Clapper Rail, Bank Swallow, Purple Martin, Belding's Savannah Sparrow, Long-billed Savannah Sparrow and Lark Sparrow, plus indirect impacts, in addition to the above, to the White-faced Ibis and two endangered fish, the Tidewater Goby and the Threespined Unarmored Stickleback. (AR 4274-4283.)[9]

The ultimate conclusions of the RDEIR were generally identical of those set forth in the DEIR, except that water availability concerns were downgraded from "Class I" to "Class III," with the remaining potentially significant impacts upon water resources determined in the RDEIR to be mitigable to levels of insignificance. (AR 3894, 7264-7265.) The RDEIR expanded the proposed mitigation to be utilized to ameliorate potentially significant impacts of the projects upon biological resources, transferring its public "education" and "cat-proof" fencing mitigation recommendations to the applicants' development agreements (see discussion of "OBNRMP" *infra*) and adding a nesting bird survey, a burrowing owl survey, "trash traps" in project bioswales[10], and implementation of a trash maintenance program (AR 3912-3915, 3947-3951, 4283-4287.) The "like kind" habitat creation/restoration mitigation proposal was further

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http://oxnard.granicus.com/MediaPlayer.php?view_id=35&clip_id=1635 , at 5:07:15-5:15:36. [See fn. 12, *infra*.]

[9] Since a great portion of the biological value of this area involves both migratory birds and local nesting species, the annotated FEIR "bird's eye view" photographs at AR 7442 and 7533 perhaps best reflect how the proposed specific plans, and particularly the SSP, would cause the City's urban (as opposed to agricultural) development to further encroach into the coastal avian habitat.

[10] A "bioswale" is a swaled drainage course designed to trap silt and pollutants. (See map at AR 4123.)

refined in the RDEIR to be a $2.7 million "contribution" from the developers of the NSP and a $1.38 million "contribution" from the developers of the SSP. (AR 4285.)[11]

Purportedly in response to the USFWS assertion on the DEIR that the specific plans will result in a "take" of federally endangered species (AR 8160), the RDEIR notes that the development agreement with both applicants requires the implementation of an "Ormond Beach Natural Resource Management Program" ("OBNRMP"), which proposes a further development fund to provide protective "(a) Fencing; (b) Signage; (c) Predator Management; (d) Invasive Plant Control; (e) Public Information; and (f) Enforcement" for the remaining coastal habitat. (AR 4263-4264.)

As with the DEIR, substantial public comments to the RDEIR were received by the City (See, e.g. AR 16166-17527), including critical objections in various categories from multiple environmental groups (AR 18162-18181, 18192-18322), the local Audubon Society (AR 17948-17955), the Ventura Local Agency Formation Commission (AR 17981-17989 – "[The alternatives] section of the RDEIR is largely inconsistent with CEQA"), the California State Coastal Conservancy (AR 18323-18338), the State of California Resources Agency—Dept. of Fish and Game (AR 18323-18338 – "the likely effects of the proposed projects include direct and indirect mortality to both the California least tern and the western snowy plover… "), and, once again, the United States Department of the Interior -- Fish and Wildlife Service ("USFWS") (AR 17392-17396 – "[w]e believe our original comments and concerns remain applicable.")

Among the objections to the RDEIR from environmental groups were concerns as to sufficiency of consideration and mitigation of global warming impacts, particularly the production of "greenhouse gas" emissions (see, e.g., AR 18406-18585, 18698-18699, 18847-18849, 18907-18926) and the acceleration in "sea level rise" (see, e.g., AR 18586-18643, 18697, 18722-18745.)

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[11] This proposed up-front "mitigation" cost proved unpopular with Hearthstone (AR 18152-18153) and was later deleted by the city council upon project approval through deferral to an "adaptive management plan."

The Final EIR

A City planning commission hearing was conducted on August 21, 2008, with respect to the adequacy of the RDEIR. (AR 7351-7377, 7444.)[12] A final EIR was issued by the City in November 2009 ("FEIR") (AR 7417.) As required by law (14 Cal. Code Regs. §15088), the FEIR appendix attempts to respond to the plethora of public comments received. (AR 8150 *et seq.*)

The FEIR recharacterized the project location in its summary as having its "corner… adjacent to the perimeter" of the naval base at Pt. Mugu (AR 7435); but then alternated between "less than a mile southeast" (AR 7525), "along the eastern border" (AR 7782), "adjacent" (AR 7850) and "three miles east" (AR 7851) in its analytical portions. Though the FEIR briefly noted that the Navy base has "4500 acres of support facilities" (AR 7851), there is no discussion in the FEIR of the military land uses immediately adjacent to the SSP and, other than jet noise, its compatibility with the proposed development on either the NSP or the SSP.

The FEIR perpetuated the "habitat value" distinction made in the initial DEIR and the RDEIR between the NSP and the SSP. (AR 7790-7791, 7796-7797.) The mitigation "contribution" discussed in the RDEIR for offsite habitat creation or restoration was increased in the FEIR to a $2.7 million exaction from the developers of the NSP and a $3.35 million exaction from the developers of the SSP; all to be utilized within 15 miles of the project area. (AR 7844-7845.)[13] The FEIR, in addition to those biological mitigation measures recommended in the RDEIR, recharacterized the proposed water feature [AR 7547—"Lake South Shore"] in the NSP plan as a domestic cat deterrent (*cf.* artist's rendering at AR 8075). The FEIR also cites further mitigation through the proposed OBNRMP, but no additional detail is provided. (AR 7467, 7500.)

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[12] The administrative record, though 28,021 pages in length, does not contain written transcripts of the relevant public hearings. Video links are referenced in the record (see, *e.g.*, AR 13674-13675, 13686-13687, 13695-13696, 13703-13704, 13711-13712, 13719-13720, 13728-13729, 13740-13741, 13750-13751) but might not be accessible if pasted directly into the browser. The Court notes, however, that all of these hearings may be found archived in video format at http://oxnard.granicus.com/ViewPublisher.php?view_id=46 for the city council and http://oxnard.granicus.com/ViewPublisher.php?view_id=47 for the planning commission.

[13] But see fn 11, *ante*.

The City responded to public comments on the RDEIR. (AR 8150-8671; Pub.Res.C. §21091(d); 14 Cal.Code Regs.§15088. Because of the recirculation and reissuance of the original DEIR, the FEIR responded only to comments on the RDEIR (AR 8150.) The City received written comments on the RDEIR from a total of sixty public agencies, utilities, environmental organizations and individuals (AR 8151-8152), which city planning staff reduced to what it calculated to be 497 "discrete comments." [14]

In response to the many public comments regarding indirect impacts to the environmentally sensitive Ormond Beach habitat and the proposed related OBNRMP mitigation, global climate change, and sea level rise, the City provided a "master" response. (AR 8153-8158.)

With respect to the concern that funding of "like kind" habitat creation/restoration should be a direct project approval mitigation condition under CEQA, and not distanced in the separate OBNRMP, the City's "master" response concluded that "the commitment to fund the [OB]NRMP is an essential element of the project and, thus, under CEQA, *is not a mitigation measure*. It will be enforced through compliance with the Development Agreement(s) and implementation of the Specific Plan." (AR 8156.)[15] (Italics added.)

Regarding the USFWS biological opinion that the project is a "take" under the Federal Endangered Species Act triggering mandatory consultation to obtain permitting authorization from the USFWS and project review under the National Environmental Policy Act (AR 8161-8166, 17392-17396), the City's "master" response stated that "for the purposes of CEQA, the

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[14] http://oxnard.granicus.com/MediaPlayer.php?view_id=38&clip_id=1237&meta_id=81006 , at 31:55.

[15] This position is in conflict with the view of the California State Coastal Conservancy, a public resource trustee agency, which stated in response to the RDEIR that "[t]he successful, and future, completion, funding, and perpetual implementation of the [Ormond Beach] Natural Resource Management Program, which does not yet exist, appears to be the only way that the proposed Specific Plan project can mitigate for these Class I [*i.e.*, "significant and unavoidable" adverse] impacts." (AR 8186.)

City has determined that with respect to sensitive offsite habitat and the species they support, all potential direct impacts from the projects have been avoided and any potential indirect impacts have been mitigated to less than significant levels." (AR 8157.)

In response to assertions that the RDEIR failed to address the cumulative impact of the project upon worldwide greenhouse gas ("GHG") emissions, the City's "master" response observed:

> "[T]he RDEIR quantifies the potential estimated operational GHG emissions associated with the project and evaluates project consistency with the 2006 Climate Action Team (CAT) Report greenhouse gas emission reduction strategies. Furthermore, the RDEIR includes several mitigation measures (AQ-2, AQ-4, and AQ-5a through -5c) that would have beneficial effects on air quality, including reduction in the components of GHG (CO2, NOx, CH4). Thus, the RDEIR's analysis does not minimize or discount scientific research concerning climate change and does not avoid addressing the issue. The RDEIR includes an accurate representation of findings concerning climate change, including the fact that there are scientific uncertainties with respect to many aspects of climate change, particularly as it relates to isolating project related impacts."

Finally, the City's "master" observations as to sea level rise stated:

> "Assuming acceleration of global warming and associated rise in sea level, **estimates of the total increase in sea level over the next century vary from 1.6 feet to 6.6 feet. This predicted rise in sea level has long-term implications for the Study Area because the rise in sea level could result in increased coastal erosion and loss of beaches** and an increased flood hazard potential in the low-lying Oxnard Coastal Plain." (AR 8153.) (Emphasis added.)

Concerns with anticipated sea level rise had been raised, among others, by the California State Coastal Conservancy ("CSCC"). (AR 8181-8185.) Among the concerns of CSCC included allowing "room [in the project] for sea level rise so that the... habitat can transition inland instead of shrinking." Ultimately, CSCC criticized as "dismissive" the City's failure to analyze anticipated sea level rise in the context of the proposed project. (AR 8144.) Contrasting the sea level rise issue with GSG emissions, CSCC differentiated the speculative (and potentially *de minimus*) effect of the project upon global climate change [GSG emissions] with the calculable (within range) localized effect of climate change upon the proposed project [sea level rise]. (*Id.*)

The City likewise proposed to deal with the biological mitigation recommendations of the California Department of Fish Game through the future negotiation and implementation of the OBNRMP. (AR 8196.)

The City's "master" comments on sea level rise responded by continuing to defer to future projects or future analysis any discussion of the impact of the prospective inland migration of the coastal wetland due to sea level rise. According to the City:

> "There is some indication in the research prepared by the Pacific Institute and others that **sea level rise will cause wetlands to migrate upslope into low-lying coastal areas,** including those adjacent to Ormond Beach. In the absence of a wetland restoration for the Ormond Beach area, **it is not possible to determine what the effects of the Ormond Beach projects on such a plan might be.** The City assumes that, in conjunction with the development of its wetland restoration plans for the Ormond Beach area, the Coastal Conservancy will consider sea level rise as part its environmental review process." (AR 8155.) (Emphasis added.)

In the course of public comments, issues were also raised on the RDEIR by the Ventura County Watershed Protection District ("VCWPD") regarding domestic "water supply reliability." (AR 8227-8229.) VCWPD accused the RDEIR of relying upon a proposed water supply infrastructure "that is not yet built" and further reliance on unpredictable groundwater "credits." (*Id.*) The City responded that there was sufficient reliability of future domestic water supply availability to withstand VCWPD's concerns. (AR 8224-8226.)

Petitioner Sierra Club and its counsel, petitioner Environmental Defense Center ("EDC"), submitted a 41-page letter, asserting various criticisms of the RDEIR. (AR 8313-8357.) These criticisms were compartmentalized into 55 categories by the City. (AR 8307-8316.) A separate 88-page letter was sent the same date directly by petitioner Sierra Club, which the City then categorized into 152 comment areas. (AR 8358-8486.)

Hearthstone Homes, in support of the NSP, also found fault with the RDEIR, asserting that "there is nothing in the [RD]EIR's analysis that supports a finding that the project would result in a significant adverse impact on either common foraging birds or raptors, including special-status birds...." (AR 8511-8520.) The SSP project applicants, in addition, contested the more specific RDEIR claim that the SSP property, other than its on-site agricultural drains, provided any form of avian foraging habitat. (AR 4497-8508.)

City Certification of the FEIR and Approval of the NSP

On December 10, 2009, the City's planning commission called a special meeting to certify the FEIR. (AR 13689-13694.) Petitioner EDC, this time on behalf of itself, the Sierra Club, and petitioner Environmental Coalition, refined its opposition to FEIR certification in 37 pages of comments, plus additional studies. (AR 19975-20028.) A research group known as "Pacific Institute" submitted a scientific report quantifying both mathematically and visually the expected sea level rise directly into the SSP and the related scope of anticipated "wetlands migration" from Ormond Beach toward the NSP. (AR 20029-20048.)

In a strongly worded letter, the Ventura County Local Agency Formation Commission ("LAFCO"), *inter alia*, took up the cause of domestic water availability concerns for the project (AR 20066-20068). The Fox Canyon Groundwater Management Agency ("FCGMA") took further critical issue with what it claimed to be the City's misinterpretation of FCGMA's own ordinance as to availability of FCGMA water "credits." (AR 20119-20120.)[16] The Department of the Navy continued to politely voice concerns over the proximity of the proposed developed portions of the project to the Navy's airfield. (AR 20070-20071.) Despite the tenor of the objections from not only the petitioners but from other public agencies, the City's planning commission recommended city council certification of the FEIR, in conformity with the recommendation of the city planning staff (AR 6,12123-12130)

Petitioners sent a 45-page letter to the City (AR 20263-20308) in opposition to the FEIR certification, accompanied by a series of attachments, including recent government reports regarding climate change adaptation [California Natural Resources Agency] (AR 20311-20512), sea level rise [California State Lands Commission] (AR 20513-20572), wildlife visitation economics [USFWS] (AR 20573-21014, 21327-21346), and domestic water rights allocations [California Department of Water Resources and FCGMA] (AR 21015-21284).

At the city council hearing on the FEIR on March 2, 2010, Hearthstone contested the FEIR finding that loss of avian foraging area was a potentially significant environmental impact,

[16] At the same time, on the same issue of domestic water availability, both VCGWD and FCGMA were contesting a separate EIR issued by the City on its 2030 general plan. (AR 20134-20135, 21281-21282.)

and asked that the proposed "mitigation" fee for the NSP be eliminated as an EIR mitigation condition.[17] The city council certified the FEIR, and in the process potentially deleted the applicants' proposed $6.05 million combined biological impact mitigation payment as a condition of approval, determining that any mitigation fee or dedication of land should be deferred to negotiation of the respective development agreements.[18] (AR 8-9.)

The planning commission set a hearing for April 7, 2011, upon staff recommendation, to approve the NSP and its related general plan amendment (AR 12847-12853), tentative subdivision map (AR 12975-13017), development agreement (AR 12788-12837), plus the necessary CEQA findings and statement of overriding considerations. (AR 12860-12956.) Attached to the packet was a proposed "adaptive management plan" (AR 13018-13026), suggesting one of two avian raptor mitigation "options." Under option "one," the NSP applicant is required to plant "native transitional" species next to the project's designed water feature"; to treat the project's storm water retention basin as "habitat"; and to dedicate 20 acres of avian raptor foraging habitat at an offsite location. Under option "two," the NSP applicant will do nothing on-site for habitat restoration but utilize "offsite" mitigation, through purchase of 30.2 "suitable" acres elsewhere. (AR 13020.)

The proposed NSP development agreement proposes creation of an OBNRMP under which the owners are responsible for a total annual resource protection "contribution" of $190,000. (AR 12814.)[19]

The proposed CEQA findings determine that there will be significant, unavoidable project impacts even after mitigation to air quality, loss of agricultural resources, noise and

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[17] http://oxnard.granicus.com/MediaPlayer.php?view_id=39&clip_id=1298 , at 1:10.

[18] *Id.*, at 2:22-3:04. The city council agreed to vote unanimously to certify the FEIR at the March 2, 2010 hearing, but deferred to March 23, 2010 the adoption of the specific language it needed to defer and/or eliminate the payment of the recommended mitigation fee. *Id.*

[19] The proposed development agreement also, *inter alia*, calls for the one-time payment to the City of $795,000 for three "environmental resource vehicles," but a closer reading establishes that these vehicles are standard municipal garbage trucks. (AR 12817.)

visual resources (aesthetics); significant or potentially significant impacts reduced to levels of insignificance through mitigation in matters of geology, water resources, air quality, soil hazards, biology, agriculture, transportation, noise and cultural resources. There were numerous proposed findings of insignificance. (AR 12860-12956.) The significant or potentially significant biological impacts were proposed to be mitigated to levels of insignificance exclusively through the implementation of the adaptive management plan discussed above; through bird surveys; and through the implementation of the previously discussed OBNRMP. (AR 12905-12914.)

Petitioners submitted a 31-page letter to the planning commission opposing the proposed project approvals on various grounds. (AR 24559-24589.) The planning commission, by a 4-3 vote on April 7, 2011, recommended city council approval of the NSP, the related land use development entitlements, and the necessary CEQA findings and statement of overriding considerations, as recommended by city staff. (AR 11-221, 12696.)[20]

The NSP project entitlements came before the city council on June 14, 2011.[21] By a 3-2 vote, the city council approved the NSP and all of the necessary related entitlements, and the related CEQA findings and statement of overriding considerations, subject to LAFCO approval to incorporate this county land into the City's boundaries. (AR 396-704.) The City filed its CEQA notice of determination on June 29, 2011. (AR 2.)

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[20] With an EIR certified on a project description of "up to 1283 residential dwelling units" (see e.g., AR 12123 [10/10/09]) plus the high school site previously rejected by the District in 2005, the City planning staff finally came clean in 2011 on the true residential unit yield anticipated in the NSP of "up to 1545 residential dwelling units" (AR 12696 [4/7/11]). The "up to 1545" language was for the most part dropped by city staff at the final public hearings to be *exactly* 1545 residential dwellings. (See http://oxnard.granicus.com/MediaPlayer.php?view_id=36&clip_id=1567 , at 26:03 and 29:00-29:30 [planning commission] and http://oxnard.granicus.com/MediaPlayer.php?view_id=35&clip_id=1635 , at 1:13:15 [city council].)

[21] http://oxnard.granicus.com/MediaPlayer.php?view_id=35&clip_id=1635

The Petition for Writ of Mandate

Petitioners filed an 81-paragraph verified petition for writ of mandate on July 28, 2011. The petition was answered by City and the NSP owners on March 9, 2012. The petition was answered by the SSP owners on March 16, 2012.

What this Case is *Not* About

This case is not about the SSP. The SSP has not been approved by the City, and no CEQA project within the SSP has been approved by the City. To the extent the Court finds the FEIR adequate in this notice of ruling, it is only adequacy as it relates to the NSP and the related NSP project approvals. To the extent the Court finds the FEIR inadequate in this notice of ruling, it is only inadequacy as it relates to the NSP and the related NSP project approvals. No extrapolation can or should be made as to FEIR adequacy with specific reference to the SSP.

This case is also not about the wisdom of the NSP project. It is about CEQA compliance on the specific issues alleged in the petition. The NSP is not currently within the city of Oxnard, and LAFCO, heretofore a project critic, must first authorize its incorporation. From the municipal perspective of "dressing up" the southeast corner of an economically blighted area of Oxnard by outward expansion, and by providing short-term construction trade jobs, the project on its face and its amenities are well-considered. From the countywide perspective of potentially jeopardizing the 17,000 jobs and billion dollar-plus contribution that the military bases provide to the larger local economy, any nonmilitary residential development push toward Pt. Mugu and its flight path is potentially short-sighted. From the global perspective of protecting the earth's shrinking resources and its sensitive and endangered species, given evolving issues with global warming and sea level rise, the SSP project at least would arguably be unthinkable. This ruling is about none of those things, and this ruling considers none of those things, because the SSP has yet to be approved and the wisdom of the project at issue is not the job of this Court.

General CEQA Principles

"Questions concerning the proper interpretation or application of the requirements of CEQA are matters of law. [Citation.]. CEQA requires that an EIR include detailed information concerning, among other things, the significant environmental effects of the project under consideration. (Pub.Res.C.§§ 21100, 21100.1.) When the informational requirements of CEQA are not met, but the agency nevertheless certifies the EIR as meeting those requirements, the agency fails to proceed in a manner required by law and abuses its discretion. [Citation] 'The EIR is the heart of CEQA, and the integrity of the process is dependent on the adequacy of the EIR.'" *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 923-924.

"In reviewing a lead agency's actions under CEQA, [the Court does] not 'pass upon the correctness of the EIR's environmental conclusions, but only upon its sufficiency as an informative document.' [Citation.] [The Court] may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable. [The Court's] limited function is consistent with the principle that: 'The purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind. CEQA does not, indeed cannot, guarantee that these decisions will always be those which favor environmental considerations.' [Citation.] [The Court] may not, in sum, substitute our judgment for that of the people and their local representatives. [The Court] can and must, however, scrupulously enforce all legislatively mandated CEQA requirements. [Citation.]" *Rialto Citizens for Responsible Growth v. City of Rialto*, *supra*, 208 Cal.App.4th at 924.

1. The City Improperly Deferred NSP Project Mitigation

An EIR must propose and describe mitigation measures to minimize the significant environmental effects identified in the EIR. Pub.Res.C.§§21002.1(b)(3); 14 Cal.Code Regs.§15126.4. The requirement that EIRs identify mitigation measures implements CEQA's policy that agencies adopt feasible measures when approving a project to reduce or avoid its significant environmental impacts. Pub.Res.C.§§21002, 21081(a).

It is not the job of the courts to assess the effectiveness of a mitigation measure. *Sacramento Old City Ass'n v. City Council* (1991) 229 Cal.App.3d 1011, 1027. At the same time, according to the CEQA guidelines: "Formulation of mitigation measures should not be deferred until some future time. However, measures may specify performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one specified way." (Guidelines, § 15126.4, subd. (a)(1)(B).)

Here, the biological resources portion of the FEIR begins at AR 7782. As it relates specifically to the NSP, potentially significant but feasibly mitigated "direct" biological impacts were found as to loss of bird-foraging habitat (AR 7825) and disturbance to nesting birds (AR 7825-7826). Potentially significant loss of bird foraging habitat was found specifically applicable to the White-tailed Kite, Northern Harrier, Sharp-shinned Hawk, Cooper's Hawk, Ferruginous Hawk, Merlin, Peregrine Falcon, Long-billed Curlew, Mountain Plover, Short-eared Owl, Loggerhead Shrike, California Horned Lark, Tricolored Blackbird and Burrowing Owl (AR 7826-7829.) As it relates specifically to the NSP, potentially significant but feasibly mitigated "indirect" impacts were found specifically applicable to the Western Snowy Plover and the California Least Tern. (AR 7830-7831.)

To mitigate the potentially significant impacts to the bird-foraging habitat, the FEIR proposed implementation of "Mitigation Measure BIO-2," except as to the California horned lark, as to which the FEIR proposed implementation of "Mitigation Measures BIO-2 and BIO-3"; and except as to the Burrowing Owl, as to which the FEIR proposed implementation of "Mitigation Measures BIO-2 and BIO-4." (AR 7825-7829.) To mitigate disturbance to nesting birds, the FEIR proposed implementation of "Mitigation Measure BIO-3" (AR 7825-7826). To mitigate the potentially significant impacts to the Western Snowy Plover and the California Least Tern, the FEIR proposed implementation of "the [OBNRMP] and Mitigation Measure BIO-5." (AR 7829-7831.)

Mitigation Measure BIO-2, per the FEIR, is offsite mitigation for the loss of 302 acres of NSP avian foraging habitat calculated at a 10:1 ratio, or 30.2 acres for loss of the NSP. (AR 7843-7845.) The mitigation cost, funded at an agricultural land value of $65,000/acre, totaled $2,702,900 for the NSP, plus seven years of maintenance and monitoring costs totaling an additional $739,000. (*Id.*)

Mitigation Measure BIO-3, per the FEIR, requires a nesting bird survey and compels certain actions if active nests are found. (AR 7845-7846.) Mitigation Measure BIO-4 is the same as Mitigation Measure BIO-3 but is specific to the Burrowing Owl. (AR 7846.) Mitigation Measure BIO-5 requires trash traps in the bioswales of the SSP. (AR 7847.)

The only other imposed mitigation is the OBNRMP as proposed in the FEIR to be prepared by a "qualified biologist" as part of the development agreement for the NSP. (AR 7822-7823.) The OBNRMP, to be approved by USFWS, requires unstated "funding … provided by the applicant[]." (*Id.*) The OBNRMP requires March-September bird fencing, regulatory signage at 100' intervals, implementation of a "predator management plan," public use educational signs and pamphlets, and enforcement coordination. (*Id.*)

When it certified the FEIR in 2010, as an option to Mitigation Measure BIO-2, the City passed the following resolution:

> "The City Council shall, at the time it considers approving the Ormond Beach Specific Plan Projects, consider adopting an Adaptive Management Plan which identifies mitigation that is comparable to Biology Mitigation Measure No. 2 recommended in the EIR regarding the creation and/or restoration of raptor foraging habitat. Specific mitigation identified in the Adaptive Management Plan shall consist of open space and/or fees to be determined by the Development Agreements for the Ormond Beach Specific Plan projects and the City shall be designated the agency responsible for carrying out said mitigation." (AR 643.)

At the time of project approval in June 2011, in its CEQA findings, the City found that, in addition to the bird surveys, the potentially significant direct avian impacts resulting from NSP development could be mitigated by *either* the 10:1 offsite mitigation set out and calculated in the FEIR *or* "the adoption of an Adaptive Management Plan regarding the creation and/or restoration of raptor foraging habitat." (AR 646-647.)

The City further found that the potentially significant indirect impacts of the NSP project upon the Western Snowy Plover and the California Least Tern could be mitigated by virtue of applicant contribution to the OBNRMP, pursuant to development agreement, which plan "would provide adequate funding for the following resource protection measures at Ormond Beach: (a) Fencing; (b) Signage; (c) Predator Management; (d) Invasive Plant Control; (e) Public Information; and (f) Enforcement." (AR 648-651.)

Petitioners' opening argument contends that the City's certification of the FEIR in 2010 violated CEQA by effectively deferring the required biological mitigation to the OBNRMP that had yet to be negotiated, approved or vetted under CEQA. (POB 9-15, PRB 6-15.) The NSP real parties argue that the OBNRMP is a project "design feature" and not biological mitigation. (NSPOB, at 9-11.) According to the NSP real parties, even if the OBNRMP is deemed project "mitigation" under CEQA, it was not improperly deferred and that the development agreement and adaptive management program approved at the time of the 2011 CEQA findings are compliant with CEQA. (*Id.*, at 11-19.)

Real parties' first line of defense, that the OBNRMP is not statutory mitigation because "it is built into [the] project's design" (RPOB 10) is incorrect. The only case cited by the NSP real parties on this issue, *Environmental Council of Sacramento v. City of Sacramento* (2006) 142 Cal.App.4th 1018, 1035, involved petitioners who were "confusing" offsite baseline assumptions with project mitigation. (*Id.*)

The OBNRMP is not a "baseline" project assumption. The projected OBNRMP components: "Funding for (a) Fencing; (b) Signage; (c) Predator Management; (d) Invasive Plant Control; (e) Public Information; and (f) Enforcement" (AR 649) are, to a substantial degree, the *exact* same project mitigation measures proposed with far greater specificity *in* the original DEIR as former Mitigation Measure BIO-1 (intepretative signs including proposed wording); former Mitigation Measure BIO-2 (cat-proof fencing of specific materials and dimensions); former Mitigation Measure BIO-3 (project plant palette with specific species recommendations to avoid invasive flora); and former Mitigation Measure BIO-6 (annual distribution of educational pamphlets to local owners and businesses). (AR 1088-1093.)

In addition to the measures being properly deemed project "mitigation" in previous environmental documents on the same project, the certified FEIR here expressly identifies the generic OBNRMP as significant impact "*mitigation*" in Impact BIO-10, Impact BIO-11 and Impact BIO-12. (AR 7830-7831.) The City's CEQA findings specifically identifies the OBNRMP as the only "mitigation" for significant offsite biological impacts, and approved the project based upon those findings. (AR 649-651.) The semantic argument by the City at the time of the FEIR (AR 8156, 1322-1323) and the argument of the NSP real parties now that the OBNRMP is simply not "mitigation" (RPOB, at 10-11) and is therefore beyond scrutiny as such,

belies the record, the fundamental principles of CEQA, and virtually every ounce of common sense.

Once the OBNRMP is conceded to be project mitigation, as it must, does the City, by first pulling the DEIR BIO-1, BIO-2, BIO-3 and BIO-6 off the table as specifically defined CEQA mitigation measures (AR 1088-1093), and then deferring such measures to whatever might be included in a heretofore unprepared OBNRMP (AR 7822-7823), violate CEQA? The question must be answered in the affirmative.

"Impermissible deferral of mitigation measures occurs when an EIR puts off analysis or orders a report without either setting standards or demonstrating how the impact can be mitigated in the manner described in the EIR." *Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal. App.4th 200, 236.

Here, the specific mitigation standards set out in the initial DEIR are abandoned in the FEIR's deferral to the OBNRMP. Instead, the OBNRMP proposes to have a "qualified" biologist "prepare or update" a "management plan/program." (AR 7822.) The "management plan/program" is required in the FEIR to contain "adequate funding" to implement the OBNRMP, but sets no standards for calculating such funding or gauging its sufficiency. Despite this lack of standards, and despite the lack of an existing OBNRMP setting out the program details upon which the funding calculation is to be based, a development agreement was nevertheless signed and approved by the city council as part of its project entitlements which sets OBNRMP funding in concrete at $190,000, without public discussion or vetting. Per the signed NSP development agreement, the only reference to the OBNRMP is as follows:

> "(f.) Ormond Beach Natural Resource Management Program. In addition to compliance with project conditions of approval imposing resource protection measures to mitigate potential environmental impacts identified by the EIR, each of the Owners shall contribute toward the payment of ongoing maintenance costs for the Ormond Beach Natural Resource Management Program described in Section 3.6.3.3 of the EIR. The annual combined contribution of the Projects shall be $190,000. This obligation shall be contingent upon the formation of a Financing District by the City, if requested by the Master Developer, to fully finance such maintenance costs and the costs of the resource mitigation measures imposed as conditions of approval." (AR 428.)

Therefore, beyond the fact that this post-certification, privately negotiated funding ceiling has no existing OBNRMP upon which to gauge whether the funding limit is in fact "adequate," the OBNRMP is expressly "contingent" in the development agreement "upon the formation of a Financing District by the City" to pay those fees, and therefore, the mitigation is illusory if the financing district is never created. The City has no obligation to create such a district.

The facts of this case exemplify why CEQA does not, except where impractical to do so, allow for deferral of project mitigation.

> "CEQA does not expressly require a public agency to find that mitigation measures adopted for a project are feasible or that they will be implemented. Rather, CEQA requires the agency to find, based on substantial evidence, that the mitigation measures are "required in, or incorporated into, the project"; or that the measures are the responsibility of another agency and have been, or can and should be, adopted by the other agency; or that mitigation is infeasible and overriding considerations outweigh the significant environmental effects. (§ 21081; Guidelines, § 15091, subd. (b).)" *Federation of Hillside & Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1261.

Because the OBNRMP is clearly project mitigation for the potentially significant biological impacts upon offsite threatened and endangered species (AR 7830-7831), because its implementation is not the responsibility of some other agency[22], and because the City has not found the OBNRMP to be infeasible mitigation, the default is that the OBNRMP is "required in, or incorporated into, the [NSP] project."

> "In addition, the agency 'shall provide that measures to mitigate or avoid significant effects on the environment are fully enforceable through permit conditions, agreements, or other measures' (§ 21081.6, subd. (b)) and must adopt a monitoring program to ensure that the mitigation measures are implemented (§ 21081.6, subd. (a)). **The purpose of these requirements is to ensure that feasible mitigation measures will actually be implemented as a condition of development, and not merely adopted and then neglected or disregarded.** (See § 21002.1, subd. (b).)" *Federation of Hillside & Canyon Associations v. City of Los Angeles*, *supra,* 83 Cal.App.4th at 1262. (Emphasis added.)

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[22] The City's self-imposed inclusion of USFWS to approve the contingent OBNRMP (AR 7822), conceivably to atone for USFWS' vigorous opposition to the City's certification of the FEIR (AR 8161-8166, 17392-17396), does not render the USFWS primarily responsible for OBNRMP implementation under CEQA.

A lead agency's formulation of specific mitigation measures may be deferred if it is impractical to formulate them at the time of project approval. "Deferral of the specifics of mitigation is permissible where the local entity commits itself to mitigation and lists the alternatives to be considered, analyzed and possibly incorporated in the mitigation plan." (*Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275; see also *Sacramento Old City Assn. v. City Council*, *supra*, 229 Cal.App.3d at 1028–1029 ["for [the] kinds of impacts for which mitigation is known to be feasible, but where practical considerations prohibit devising such measures early in the planning process … , the agency can commit itself to eventually devising measures that will satisfy specific performance criteria articulated at the time of project approval"].)

In this case, it was not "impractical" to formulate the mitigation measures deferred to the OBNRMP, as most of those measures had previously been formulated in detail at the time of the DEIR. (AR 1088-1093.) Second, the City has not "committed itself" to the OBNRMP, by expressly making the unwritten plan contingent upon a financing district that might or might not ever be created (AR 428); and finally, by insisting both before the city council (AR 8156) and this Court (RPOB, at 9-11, though joinder) that the OBNRMP is not project mitigation at all. Though the tentative tract map here imposes the following condition -- "All FEIR mitigations listed in the FEIR Mitigation Monitoring and Reporting Program apply as conditions of approval" (AR 141) -- the insistence that the OBNRMP is not project mitigation is less a resounding "commitment."

Finally, as recently stated in *Rialto Citizens for Responsible Growth v. City of Rialto*, *supra*, 208 Cal.App.4th at 944:

> "[T]he rule prohibiting deferred mitigation prohibits loose or open-ended or performance criteria. Deferred mitigation measures must ensure that the applicant will be required to find some way to reduce impacts to less than significant levels. If the measures are loose or open-ended, such that they afford the applicant a means of avoiding mitigation during project implementation, it would be unreasonable to conclude that implementing the measures will reduce impacts to less than significant levels."

Here, the scaled-back language of an anticipated OBNRMP set out in the FEIR -- including, *inter alia*, requiring construction of "adequate" fencing; implementation of a "predator

management plan" (*i.e.*, plan within a plan); creation of an "invasive plant control program" (another plan within a plan); and law enforcement working "in coordination," creates the very "loose or open-ended performance criteria" that makes the intended reduction of offsite biological impacts to insignificant levels impossible to assess.

The Public Resources Code mandates that "[e]ach public agency **shall** mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so." (Pub.Res.C.§21001.2(b).) (Emphasis added.) The City, by removing (for whatever reason) very specific project mitigation conditions from its CEQA documents, reinventing the same mitigation into a currently nonexistent and far more "loose or open-ended" future "plan," refusing to acknowledge the mitigation items as required mitigation and, finally, rendering the unwritten plan expressly contingent upon the creation of a possible financing district, violates the mitigation deferral prohibitions of CEQA.

2. The City's Analysis of Greenhouse Gas Emissions Did Not Violate CEQA When the RDEIR was Circulated for Public Review in July 2008

Ventura County is a federal and state "non-attainment" area for state and federal air quality standards, and virtually all construction projects in the county sufficient to require an EIR will have a cumulative significant impact that cannot be mitigated to levels of insignificance. (See, e.g., AR 992, 996-998, 1006-1009.)

Independent of local air quality concerns, however, there are global air quality issues that affect, to some degree, background concentrations of carbon dioxide and other gases in the earth's atmosphere. Carbon dioxide concentrations today are at the highest atmospheric levels that they have been in the last 420,000 years and likely the last twenty million years. (AR 4179.)

There is a natural phenomenon on earth called the "greenhouse" effect. (AR 4179.) Greenhouse gases ("GHGs") keep the earth's surface temperature currently 57 degrees (Fahrenheit) warmer on average than it would be absent the "greenhouse" effect. (*Id.*) The global issue is that the earth's temperature is increasing as more heat is being trapped within the GHGs, and atmospheric greenhouse gas levels are on the rise. (*Id.*) In addition to several man-made greenhouse gases such as hydroflourocarbons, natural levels of both carbon dioxide and methane can be (and are) increased by human activity. (*Id.*)

Fossil fuel combustion accounts for over 80% of California's carbon dioxide emissions. (AR 4180.) It is "virtually certain that atmospheric concentrations of greenhouse gases will continue to rise over the next few decades." (AR 4179.) Higher temperatures are conducive to air pollution formation and significant across-the-board impacts including "substantial loss of ice in the Arctic" resulting in sea level rise. (AR 4181-4184.)

The initial DEIR in this case avoided all discussion of GHGs and global warming trends (see, e.g. AR 992-1018.) However, as mandated in 14 Cal.Code Regs.§15144: "Drafting an EIR or preparing a negative declaration necessarily involves some degree of forecasting. While foreseeing the unforeseeable is not possible, an agency must use its best efforts to find out and disclose all that it reasonably can."

After a barrage of criticisms of the initial DEIR, including the failure to recognize and consider the fact of global climate change (see, e.g., AR 17527)[23], the City published its RDEIR, which makes the following claim:

> "During the period of preparation for the May 2007 DEIR, new information became available concerning approaches to addressing greenhouse gases (GHG) and climate change in CEQA documents. In response to this new information and comments submitted on the DEIR, the City decided to introduce a new discussion of these issues and to place it in the Air Quality section of the report." (AR 7256.)

The RDEIR does spend considerable energy, as promised, recognizing GHG concerns, the state of the scientific research, and the current legislative and regulatory framework. (AR 4179-4199.) This discussion is carried into the FEIR. (AR 7719, 7738-7757.)

There are two unique difficulties presented in considering the potential cumulative impact of GHG emissions related to the NSP project. First, the contribution is global and not local, because greenhouse gases rise and combine globally at upper atmospheric levels.[24] As a

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[23] The City's decision to rewrite portions of the DEIR may have been aided by the fact on August 24, 2007, the governor signed into law Public Resources Code 21083.05, which mandated the Office of Planning and Research to promulgate CEQA administrative regulations "for the mitigation of greenhouse gas emissions, or the effects of greenhouse gas emissions" by July 1, 2009, to be certified and adopted by January 1, 2010.

[24] "Because the primary greenhouse gases have a long lifetime in the atmosphere, accumulate over time, and are generally well mixed, their impact on the atmosphere is mostly independent of the point of

global contributor, cumulative project-related mitigation is virtually impossible to assess when the project is placed alongside all other global contributors, from rain forest clearing activities in the Amazon, to mass industrial polluters in the Far East, layered upon climate differences, to give CEQA mitigation as to this project any kind of rough proportionality. (AR 7741 ["...climate scientists' understanding of the complex global climate system, and the interplay of the various internal and external factors that affect climate change, remains too limited to yield scientifically valid conclusions on such a localized scale"]; AR 7747-7748.)

Second, because the contribution is global, the primary post-construction GHG contributors (the subdivision residents), all lived and worked elsewhere before the project, and no net gain of project-related GHG emissions could theoretically ever be calculated because, in light of all the other climate-related variables, it could just as easily be a "wash" or a net loss. (AR 7748 – "...development projects may simply shift the locale of GHG emissions, rather than causing "new" GHG emissions.")

The FEIR was able to use air quality models to calculate the actual GHGs associated with the NSP project, and did so with specificity (AR 7751), but the worldwide effect of that specific contribution and how it could be translated to appropriate mitigation was deemed beyond current scientific ascertainment by the City:

> "Although the direct output of greenhouse gases from a project can theoretically be estimated (provided valid methodologies are developed), the emission of GHGs associated with implementation of any one development project would not necessarily result in any discernible direct impact globally or locally on climate, water availability, plant or wildlife species, populations, habitats, or ecosystems. Based on available science, the indirect effects of project-specific greenhouse gas emissions from an individual development project, such as the proposed high-density residential project, are speculative, and available science considers them immeasurable." (AR 7757.)

The City therefore concluded it was unable to either determine the significance of the impacts of the quantified NSP project-related GHG emissions or to propose any form of associated GHG-specific mitigation measures, other than those otherwise identified to mitigate

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emission." *Rialto Citizens for Responsible Growth v. City of Rialto*, *supra*, 208 Cal.App.4th at 938 [quoting EIR].

adverse impacts due to fossil fuel combustion, project-related dust, and other air quality impacts as part of the local air basin's pollution "non-attainment" status. (AR 7757.)

Petitioners contend that under *Communities for a Better Environment v. City of Richmond* (2011) 184 Cal.App.4th 70, the City is obligated to make significant determinations associated with its GHG calculations, and if significant, to adopt GHG-related mitigation measures to reduce the impacts. (POB, at 23-25; PRB 15-21.) The NSP real parties contend, *inter alia*, that substantial evidence supports its FEIR conclusion that GHG project-related significance (as opposed to raw quantification of emissions) is too "speculative" to advance an opinion for purposes of CEQA.

After oral argument in this matter, the NSP real parties cited the Court to *Rialto Citizens for Responsible Growth v. City of Rialto*, *supra*, 208 Cal.App.4th 889 ("*Rialto Citizens*"), certified for publication on August 27, 2012. Petitioners submitted a formal response to the letter brief.

Rialto Citizens, *supra*, involved an attempt to block the City's approval of a retail center anchored by Wal-Mart. The city of Rialto determined in its EIR that "the project's impacts on greenhouse gas emissions and global climate change was too speculative to evaluate," and on this basis concluded that "a conclusion on the significance of the environmental impact of climate change cannot be reached." (208 Cal.App.4th at 935.) No GHG-specific mitigation was recommended. (*Id.*)

The *Rialto Citizens* court, using a substantial evidence test, held that "...the City did not abuse its discretion in concluding that the impact was too speculative to determine, **given the absence of established legal or regulatory guidelines**, or accepted methodologies, to gauge the cumulative impact." (208 Cal.App.4th at 937.) (Emphasis added.) In so doing, the *Rialto Citizens* court notes that the EIR in that case was certified in July 2008, well before relevant guidelines on GHG emissions were issued. According to the *Rialto Citizens* court, at 940:

> "**In 2010, new Guidelines were adopted which provide lead agencies with critical guidance in calculating and determining the significance of greenhouse gas emissions (Guidelines, § 15064.4) and in formulating feasible mitigation measures to reduce their impacts (Guidelines, § 15126.4, subd. (c))**. But none of these Guidelines

were in effect when the [Wal-Mart] EIR was certified in July 2008; thus they were not available to guide the City in preparing the EIR." (Emphasis added.)

Petitioners here contend that the referenced CEQA guidelines, actually adopted by the California Natural Resources Agency on December 30, 2009, were adopted more than two months before the City's certification of its FEIR March 2, 2010. (9/7/12 PSB, at 2.)

NSP real parties, however, note that its RDEIR upon which its FEIR is based was sent out for public comment in July 2008 (AR 3866). 14 Cal.Code Regs. 15007(c) states: "If a document meets the content requirements in effect when the document is sent out for public review, the document shall not need to be revised to conform to any new content requirements in guideline amendments taking effect before the document is finally approved."

Since the City's RDEIR as to GHG emissions met the "content requirement" of CEQA when it was released for public review in July 2008 as substantively confirmed in *Rialto Citizens*, it is satisfactory for purposes of CEQA. This is not to say, as definitively pointed out in *Rialto Citizens*, *supra*, that a draft or recalculated draft EIR sent out for public review *after* December 30, 2009, would be able to beg the question of GHG emission significance, and related mitigation where the impact is deemed significant. Because the NSP FEIR was CEQA-compliant as to GHG emissions at the time of its 2008 circulation, however, it would be error to return that portion of the FEIR certification to the administrative level for revision and recirculation in this case.

3. The City Violated CEQA by Misstating the Intended Number of Homes Needing Domestic Water

A case of significance published on the eve of issuance of the original DEIR in this case was the decision of the California Supreme Court in *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412 ("*Vineyard Area Citizens*"). *Vineyard Area Citizens* is the Supreme Court's definitive opinion on proper consideration of prospective water supply sources in an EIR. In *Vineyard Area Citizens*, the lead agency approved a community plan and a specific plan for a mixed-use development. (*Id.* at p. 421.)

The plan in *Vineyard Area Citizens* proposed to extract approximately 10,000 acre ft./yr. of water ("AFY")[25] from the North Vineyard Wellfield to service a part of the proposed new development, contractual water rights to which had yet to be financed and acquired, in addition to "conjunctive use" of surface water supplies from the American River. This proposed wellfield drilling drew criticism from USFWS, the National Marine Fisheries Service and the Nature Conservancy, which believed that anticipated aquifer level reductions in that wellfield could have adverse impacts upon steelhead and Chinook salmon migratory and spawning conditions in the nearby Cosumnes River. (40 Cal.4th at 423-425.) After no discussion of the issue in the DEIR, the FEIR disagreed. (*Id.*, at 425-426.)

The Supreme Court in *Vineyard Area Citizens*, in rejecting Sacramento County's analysis of the sufficiency of its analysis, set out the proper considerations in properly performing such environmental review. According to the Supreme Court's four-pronged analysis:

First, the decision maker "must, under the law, be presented with sufficient facts to evaluate the pros and cons of supplying the amount of water that the [project] will need." (*Vineyard Area Citizens*, supra, 40 Cal.4th at p. 431.)

Second, an EIR evaluating a planned land use project "must assume that all phases of the project will eventually be built and will need water, and must analyze, to the extent reasonably possible, the impacts of providing water to the entire proposed project." (*Vineyard Area Citizens*, *supra*, 40 Cal.4th at p. 431.)

Third, "the future water supplies identified and analyzed must bear a likelihood of actually proving available; speculative sources and unrealistic allocations ('paper water') are insufficient bases for decision making under CEQA. [Citation.] An EIR for a land use project must address the impacts of likely future water sources, and the EIR's discussion must include a reasoned analysis of the circumstances affecting the likelihood of the water's availability." (*Vineyard Area Citizens*, *supra*, 40 Cal.4th at p. 432, original italics.)

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[25] "An acre-foot is 43,560 cubic feet...[I]it is an irrigation-based measurement equaling the quantity of water required to cover an acre of land to a depth of one foot." *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 940 [fn. 1].

Fourth, "where, despite a full discussion, it is impossible to confidently determine that anticipated future water sources will be available, CEQA requires some discussion of possible replacement sources or alternatives to use of the anticipated water, and of the environmental consequences of those contingencies. [Citation.]" (*Vineyard Area Citizens*, *supra*, 40 Cal.4th at p. 432.)

Here, the 2007 DEIR determined water resources to be a "Class I" significant and unavoidable NSP impact, with the following observations consistent with the concerns in *Vineyard Area Citizens*:

> "While the City has prepared plans that would ensure a sufficient supply of water to the Study Area, not all of these plans have environmental clearance, or funding for implementation (i.e., Phase II of the GREAT Program). Thus, for CEQA purposes, there is insufficient water supply available to serve the project from existing entitlements and resources (i.e., new or expanded entitlements) would be needed." (AR 749.)

Historically, groundwater in the potable aquifer beneath the project site here has been subject to overdraft and seawater intrusion (AR 920-921), which situation has been kept somewhat in balance through aquifer recharge strategies. (AR 924, 939-940.) The City's residents receive a 2:1 "blend" of local well water and surface water from the State Water Project through Calleguas Municipal Water District ("CMWD"). (AR 923.) Because the potable aquifer traverses a series of municipal and county jurisdictions (AR 939), the City has been given a maximum groundwater pumping allocation through the FCGMA. (AR 923.)

If the City uses less than its groundwater pumping allocation with FCGMA, it is entitled to a "conservation credit." (AR 940.) If the aquifer is recharged through the City's introduction of "foreign water," the City is entitled to a "storage credit." (*Id.*)

The City's allocation of state water from CMWD is not guaranteed and is subject to availability. (AR 925.) The City's allocation of water from FCGMA was, at the time of the DEIR, being reduced. (*Id.*) Per the DEIR: "Projections indicate the City will only be able to meet 48 percent of future demands by the year 2020" and "[a]dditional water sources will need to be developed [by the City]." (AR 926.)

In order to make more potable water available for future uses, the City's wastewater treatment plant had embarked upon a program under the acronym "GREAT," designed to recycle water for groundwater recharge and agricultural irrigation. (AR 927-931.) This way, potable water currently being used for agriculture could be made available for domestic use. (*Id.*) The water recycling program also proposed that the treated wastewater be used, *inter alia*, for "wetlands development and enhancement" at Ormond Beach. (*Id.*, at 930.) In the event the benefits of the City's "GREAT" recycling program failed to reach its goals, the DEIR identified a variety of alternatives to increasing supply or decreasing consumption. (AR 944.)

The DEIR charted out total domestic water supply availability for the City increasing from 27,500 AFY in 2005 to 45,400 AFY in 2025 and thereafter. (AR 945.) Per the DEIR, the NSP project "will require approximately 800 AFY, approximately 600 AFY of which must be potable." (AR 969-970.) Per the DEIR, the long-term supply of the 800 AFY demand created by the NSP "depends on the implementation and construction of the GREAT program." (AR 970.) As concluded in the DEIR:

> "Although Phase I of the GREAT program has a reasonable assurance of implementation, implementation of Phase II is uncertain and will need to proceed through regulatory review. In 2020, an adequate supply of potable water based on the build-out of the City of Oxnard 2020 General Plan is contingent on the construction and operation of the tertiary and advanced water treatment facilities. If Phase II of the GREAT program is not approved or is delayed, the adequacy of the potable water supply cannot be assured past 2010. The City of Oxnard has not yet adopted a project-level EIR/EIS for Phase II of the GREAT program. Without an approved project-level EIR/EIS for Phase II of the GREAT program, it cannot be stated with certainty that an adequate potable water supply will become available for the [NSP].
>
> Successful implementation of Phase I and Phase II of the GREAT program would be sufficient to reduce the impacts to less than significant." (AR 970.)

The City's Water Resources Division took issue with its DEIR, asserting that the assumptions set out in the DEIR regarding future water supplies had in part been rendered obsolete through new studies. (AR 17597-15798, 17608). The revised water availability

assumptions were stated to be one reason for the creation of and recirculation of the RDEIR (AR 3884.)[26]

Upon receiving a further engineering water supply analysis for the NSP and the SSP (AR 4044), the RDEIR removed water resource availability as a "Class I" (significant and unavoidable) impact. (AR 3893-3894.) In fact, water supply availability was deemed a "Class III" (insignificant impact) in the RDEIR. (AR 3894-3895.) Relying upon these reports generated in 2008, the RDEIR concluded that "...with certain reasonable assumptions, there will be sufficient water supplies for the projects under all hydrologic conditions, including normal, single dry, and multiple dry years, for at least the next 20 years." (AR 4045.)

As of the RDEIR issuance, the maximum annual water usage within the City had been 30,084 AFY in 2007. The City has a 17,379 AFY base allocation from CMWD, though not part of a binding contract. According to the RDEIR, "based on historical experience, it is substantially likely that the reliability of CMWD supplies will be the same whether the City purchases water from CMWD with or without a contract." (AR 4046.) In future years, according to the RDEIR, "CMWD has indicated that it will have sufficient water supplies to meet all water demands in its service area, including those of the City and the Ormond Beach projects, through 2030. (*Id.*) The factual reliability of the CMWD water source is analyzed at length. (AR 4047-4060.)

With respect to local groundwater, the RDEIR asserted the right to a 10,726 AFY pumping allocation from FCGMA, plus an additional "credit" of 12,294 AFY. With respect to the reliability of the "credit," the RDEIR reported:

> "[T]he FCGMA has implemented a series of three 5% reductions on allocations as a further means of maintaining the viability of local groundwater resources. The FCGMA has the authority to impose further cutbacks on allocated groundwater pumping. However, the FCGMA recently adopted a resolution which suspends the imposition of further cutbacks on those entities who participate in programs that provide new

[26] "And having looked to Government for bread, on the very first scarcity they will turn and bite the hand that fed them." Edmund Burke, *Thoughts and Details on Scarcity* [1795]. The DEIR water availability impacts conclusions had placed the City's EIR consultants and URS Corp. directly in the crosshairs of the applicants paying for the URS report and the City itself (with other projects under environmental review). Between issuance of the DEIR and the issuance of the RDEIR, the NSP applicant suggested refocusing attention away from the Supreme Court's *Vineyard Area Citizens* decision. (AR 17715.)

supplemental water supplies within the FCGMA jurisdictional boundaries. The City is a participant in such a program and, thus, expects to be exempted from further allocation cutbacks. The City's supplemental water program is described below." (AR 4063.)

The first part of the City's supplemental water "program" evolved from another agency's diversion of Conejo Creek surface waters, allowing FCGMA irrigation pumping "credits" to members of the Pleasant Valley County Water District ("PVCWD"). (AR 4064.) Those conservation credits are first transferred from PVCWD to CMWD, which in turn transfers them to the United Water Conservation District ("UWCD"), which in turn pumps the water represented by those "credits" and sells it to the City. (*Id.*) That program, in which the City is effectively buying water formerly pumped by farmers on the Oxnard Plain, yields 4000 AFY, plus an additional anticipated 5000 AFY. Pursuant to pending agreement, the RDEIR forecasts that "it is highly unlikely that any restrictions on use of the credits generated through the program will be required." (AR 4064-4065.)

The RDEIR also engaged in a significantly expanded discussion of the City's water recycling ("GREAT") program. (AR 4065-4074.) The first phase of GREAT, "to be operational by 2011," would provide 5000 AFY of available potable water to the City (and ultimately 17,500 AFY), by delivering treated wastewater to "municipal and industrial uses," agricultural properties, and injection into the groundwater for both storage and seawater intrusion offset. (AR 4065-4066.) Per the RDEIR, the beneficial uses of the recycled water will provide further FCGMA credits to the City. (AR 4066-4067.) The City issued municipal bonds which the RDEIR indicates will be sufficiently earmarked to cover the $60.2 million cost to build the GREAT program waterworks infrastructure. (AR 4069-4070.) The RDEIR concludes, in direct contrast to the DEIR, that the prospective availability and use of recycled GREAT water by other users to increase potable water supply "is reasonably considered a reliable future supply…". (AR 4071-4074.)

In addition to the above, the City has a separate contract with UWCD until the year 2036, entitling the City to a pumping sub-allocation of 7709 AFY and additional "credits" of approximately 7000 AFY. (AR 4075.)

Under the RDEIR, the City expected a total potable water demand of 43,285 AFY by the year 2030, of which 815 AFY, or 1.88%, is expected from the NSP. (AR 4079.) The expected supply total based upon all of the above from and after 2020 is projected to be 54,000 AFY, with the exception of continued multiple dry years, but in every year, supply is expected to exceed demand. (AR 4080-4082.) The RDEIR noted the City's diversity of water supply "portfolio" as a protection from lack of availability concerns. (AR 4082-4083.)

Among others, VCWPD took issue with the water delivery conclusions of the RDEIR. Among other things, VCWPD asserted:

> "It is clear that the applicant is relying on water supplies from infrastructure that is not yet built. The applicant assumes that the water supply projects will go forward and be reliable; however, evidence that the projects will indeed be built is not great. Therefore, the significance analysis may need to be revised. Please describe how the analysis meets with the criteria in [14 Cal.Code Regs.]Section 15064(b)." (AR 8227-8229.)

VCWPD also took issue with the RDEIR deciding how the FCGMA will treat the City's claim to water "credits" despite 5% annual cutbacks in pumping allocations. (*Id.*)

Perhaps recognizing it had pushed the water availability pendulum too far into its RDEIR conclusion of environmental insignificance (*i.e.*, no potential significance), the City's FEIR relabeled "[w]ater [s]upply and demand" as a Class II (significant but feasibly mitigated) impact. (*C.f.*, AR 3895, 7446).[27] The FEIR proposes five mitigation measures: an "on-site domestic water system," an "on-site recycled water system," "exterior water conservation," "grey water" and "drought-tolerant landscaping," as mitigation to reduce water availability impacts to levels of insignificance. (AR 7459.)[28]

In addition to relabeling the finding of significance as "Class II," the FEIR calculated a relatively constant City water supply allocation of between 42,580 and 45,510 AFY of constant

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[27] In a span of 30 months, therefore, the significance of domestic water availability, after "full" environmental review, ran the gamut from a Class I impact (DEIR--AR 7466) to a Class III impact (RDEIR--AR 3895, 3920) to a Class II impact (FEIR--AR 7446).

[28] These had been the same mitigation measures itemized in the RDEIR to reduce the "insignificant" water availability impacts to even more insignificance. (AR 3954.)

supply sources between 2015 and 2030, and anticipated banked "credits" of 87,000 AF as of 2030. (AR 7635-7637.) During the same time frame, the FEIR projected a City demand for potable water of between 38,820 AFY and 41,040 AFY. (AR 7637-7641.) In recalculating annual supply and demand, the FEIR notes that "until the GREAT Program is operational (i.e., 2011 or 2012), the City may rely on a portion of its FCGMA groundwater credits to meet demand in multiple dry water years." (AR 7642.) Other than the "significance" recharacterization and water supply and demand recalculations, the FEIR essentially restates the water delivery analysis of the RDEIR. (AR 7601-7646.)

Upon issuance of the FEIR, LAFCO (AR 20067) and FCGMA (AR 20119-20120) continued to express written opposition to the certification of the EIR and the City's reliance on paper "credits" to cover the recalculated drought shortfall. LAFCO also objected because the FEIR was supported by an "addendum" to the 2008 water assessment report which was never vetted for public review and comment. (AR 20067.)

For the most part, the City's FEIR water resources discussion is compliant with the requirements of *Vineyard Area Citizens*, *supra*. The FEIR does not simply "assume" a water supply solution. The FEIR does not defer analysis of water supply solutions for the NSP to future projects. Third, despite the objections of the less parochial water agencies, there is substantial evidence in the record to support the city council's findings of a "reasonable likelihood" of water actually being available to the project, while acknowledging certain levels of uncertainty. The EIR discusses possible "replacement" water sources and the levels of uncertainty applicable to the replacement sources.

As pointed out by petitioners, however, there is a fundamental quantitative flaw throughout the project water demand analysis of the FEIR. The EIR process for the NSP studied for five years a 1283-unit residential project that the City and the applicant were aware, at the time of virtual project inception in 2005, was really a 1545-unit residential project. [See fns. 5 and 20, *ante*.] (POB 28, PRB 25-26.)

In 2005, while Oxnard Union High School District ("OUHSD") had no problem with negotiating project mitigation in the form of "in lieu" statutory school impact fees (AR 14235-

14236), OUHSD made it clear to city planning staff that the District was *not* interested in building a high school on the proposed site:

> "The District had several meetings with developers about placement of a high school within the northern subarea of the Project. **The high school site** favored by developers on the eastern boundary of the northern subarea **is unsuitable** because of its close proximity to high voltage power lines and a proposed 36-inch high-pressure natural gas pipeline. The site is also unacceptable because it is smaller than the 55 acres needed for a comprehensive high school." (AR 14236.) (Emphasis added.)

Though OUHSD never once recanted its position that it had no intention of building a high school within the NSP, the City and real parties forged ahead with five years of analyzing a 56-acre high school beneath power lines at the project site. (AR 7440.) The situation was so peculiar that LAFCO, on the eve of the city planning commission recommendation of certification of the EIR in December 2009, rendered the following objection:

> "**The FEIR does not explain why the project still proposes a 56-acre high school after staff from the Oxnard Union High School District has indicated that the District has no plans or intentions for a high school in or near the project site**. It is, therefore, unclear why the FEIR includes an analysis of the development of a high school as part of the proposed project." (AR 20068.) (Emphasis added.)

The City's apparent response, per its handwritten staff notes, is that the high school was "part of the project descript[ion]." The project description obviously should have changed in 2005, two years *before* the initial DEIR, but did not do so until apparently the day or days immediately after the City certified the EIR as accurate in March 2010. At that time, as the City and the NSP real parties had known five years earlier, this project was a 1545-unit residential home project from its virtual inception. [See fns. 5 and 20, *ante*.]

"An accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR." *Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1448. The project description here of "1283 residential dwelling units" and a "56-acre high school site" was *not* accurate at the time of DEIR issuance in May 2007 (AR 743, 745, 856, 860, 862); was *not* accurate at the time of the RDEIR issuance in July 2008 (AR 3890, 3990, 3994, 3996); and was *not* accurate at the time of the FEIR issuance in November 2009. (AR 7438, 7440, 7538, 7542-7543, 7544-7545).

"If the [project] description is inadequate because it fails to discuss the complete project, the environmental analysis will probably reflect the same mistake." (Kostka and Zischke, *Practice Under the California Environmental Quality Act*, (CEB) March 2012 update.) Here, all of the quantitative analyses of the FEIR, including those as to domestic water demands, are premised upon the erroneous 1283 dwelling units "plus 56-acre high school" project that was shot down by OUHSD in 2005.

As the NSP real parties quote, "new and unforeseen insights may emerge during [CEQA] investigation, evoking revision of the original proposal" (NSP OB, at 34), citing *Western Placer Citizens for an Agricultural & Rural Environment v. County of Placer* (2006) 144 Cal.App.4th 890, 898. If material "new" and "unforeseen" changes discovered during investigation can dictate project description modification, certainly known and expected material changes should compel a fundamental project description change as well.

NSP real parties contend that as far as the water delivery analysis is concerned, the misstated project description is essentially "no harm, no foul" because the Court can mathematically extrapolate from gallons of water usage per high school student to gallons of water usage per residential acre and, utilizing such a conversion formula, should conclude that water use for a 52-acre high school ought to be greater than domestic water use for 262 additional homes. (NSP OB, at 34.) Such a request misconstrues the fundamental purpose of CEQA.

As clearly emphasized by our Supreme Court in *Vineyard Area Citizens*:

> "The audience to whom an EIR must communicate is **not the reviewing court,** but the public and the government officials deciding on the project. That a party's briefs to the court may explain or supplement matters that are obscure or incomplete in the EIR, for example, is irrelevant, because the public and decision makers did not have the briefs available at the time the project was reviewed and approved. **The question is therefore not whether the project's significant environmental effects can be clearly explained, but whether they were.** The ... FEIR fails that test." (*Vineyard Area Citizens*, supra, 40 Cal.4th at p. 443.) (Emphasis added.)

The proverbial "icing on the cake" here is that the CEQA project "alternative one" had proposed to build out the entire NSP to 1545 residential units and have the high school built

elsewhere; in other words, essentially the project which the City and the NSP real parties had known since 2005 was the "real" project. (AR 7449, 8091-8092.)[29] The FEIR **rejects** alternative one because building the high school elsewhere would further negatively impact the significant and unavoidable loss of agricultural resources; and "potentially" greater offsite biological impacts. (AR 8112.) The City made CEQA findings **rejecting** "alternative one" as environmentally inferior to the 1283-unit development which was studied; at the same time knowing (but not disclosing) that "alternative one" or something very close to it was the project which was going to ultimately be approved. (AR 694-695.)[30]

The goal of CEQA is one of "public accountability" in matters affecting the environment. *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 124. By withholding the true objective of the project from the citizens of Oxnard and the responsible agencies, and quite possibly from the city council itself [see fn. 5, *ante*], the City's multi-year review of a phantom 56-acre high school project site does little to advance the public accountability aspects of CEQA. Petitioners' objections to the increased 1545 residential unit project approvals are valid, even if those objections are limited to the issue of water availability. The FEIR here is deficient for not utilizing the full 1545-unit residential project as the stated basis to calculate known and anticipated water demand.

4. The City Should Properly Supplement Biological Baseline Data in Its Revised EIR

An EIR must describe existing environmental conditions in the vicinity of the proposed project, which description is termed "environmental setting." (14 Cal.Code Regs.§15125.) The environmental setting is critical in order to establish baseline physical conditions against

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[29] The subdivision layout used to describe "alternative one" in the FEIR is the same map used to approve the NSP project months later. (*C.f.*, AR 379 [tentative tract map], 11499 [FEIR "alternative one"].)

[30] Though they are separate and distinct approvals, it is common in CEQA practice to have the FEIR certified concurrently with the approval of the project(s) that the FEIR is reviewing. This did not happen in this case, and could not have happened in this case, because the project studied in the December 2009 FEIR (1283 units) is different that the NSP project that the applicants had intended to build and the City intended to approve (1545 units) since OUHSD's rejection of the high school site in 2005.

which the reasonably anticipated effects of a project can be measured. (See, *e.g.*, *Communities for a Better Environment v. South Coast Air Quality Mgmt. Dist.* (2010) 48 Cal.4th 310, 320.)

Despite the number of years this project has been in process, the FEIR admits to conducting only a single day of biological field work in November 2004, which survey "provided limited information on plants and wildlife since it was conducted only one day during the non-breeding season for birds and non-blooming period for most plant species." (AR 7818-7819.) Petitioners cite substantial evidence in the record that the preparer of the EIR biological setting here did not follow standard biological survey or assessment protocols. (POB AR 18165-18167.) NSP real parties contend that there were sufficient resources in the available literature to augment the one day "survey" and provide a sufficient biological baseline. (AR 7818; NSPOB, at 43-44.)

It can be prejudicial error for an EIR to fail to provide critical baseline information. *Cadiz Land Co. v. Rail Cycle* (2000) 83 Cal.App.4th 74, 94-95. The City's certification of the biological impacts portion of the FEIR is being set aside to reformulate biological impact mitigation measures to contemporaneously adopted detailed standards and criteria (pp. 19-25, *supra*). Given the environmental stakes involved, affecting "one of the largest and most important coastal wetland, estuarine, and dune complexes remaining in Southern California" (AR 1044), the City's continued reliance upon primarily decades-old literature, a one-day off-season visit in 2004, and a 2005 plant data base search, would be insufficient to provide an adequate 2013 (or later, if further review) baseline for setting mitigation of potentially significant biological impacts, both on-site and offsite.

On remand, the City can conduct scientifically appropriate surveys both on-site and offsite in order to provide a proper baseline upon which to properly gauge the biological resources mitigation revisions to the EIR which, as will now be discussed, needs to be substantially revised.

5. The City Violated CEQA by Deferring Proper Analysis of Expected Sea Level Rise Impacts

The DEIR here contains no discussion of either climate change or sea level rise, except the finding that the SSP was within the Oxnard "Tsunami Zone," and that risks to life following "seismic event or submarine landslide" were insignificant because tsunami warning "may be feasible." (AR 898.)

The City, after objections asserting the need to address sea level rise, ramped up the discussion in the RDEIR, quantifying (but not mapping or analyzing) expected sea level rise as between 1.6 to 6.6 feet over the next 100 years:

> "Sea level is currently on the rise. Contributing factors include the melting of glacial ice, glacial isostatic adjustment, and decrease in water density, all of which are attributed to a global increase in atmospheric temperatures. Sea levels have risen approximately 6 inches in the last 100 years (Peltier and Tushingham, 1989), and continue to rise at a rate of about 1.8 mm/year (Douglas, 1997). **Assuming acceleration of global warming and associated rise in sea level, estimates of the total increase in sea level over the next century vary from 1.6 feet to 6.6 feet.** This predicted rise in sea level has long-term implications for the Study Area because it would likely result in increased rates of loss of beaches and a higher flood hazard in the low-lying Oxnard Coastal Plain." (AR 4022.)

> "Although climate change impacts are uncertain and cannot be precisely modeled, existing evidence, including the effects of warming in the West over the last century, demonstrate that climate change will likely affect future snowpack accumulation, water supply, runoff patterns, sea level, incidents of flooding and droughts, evapotranspiration rates, water requirements and water temperature." (AR 4076.)

The RDEIR includes a tsunami map showing that based upon 2008 sea levels, tsunami risk cuts through the heart of the proposed SSP development and most of the Navy base, but does not reach the NSP. (AR 4021.) Tsunami risk from seismic event or submarine landslide was elevated to a "Class II" impact and a tsunami emergency evacuation plan was added to the mitigation requirements for the SSP. (AR 4036-4037.)

In 2003, the California Energy Commission ("CEC") established the California Climate Change Center ("CCCC") to document climate change research through work conducted at the Scripps Institute of Oceanography and Cal Berkeley. (AR 18974.005.) Through CEC, five state agencies, including the California Environmental Protection Agency and the California

Department of Transportation, commissioned CCCC to evaluate areas at risk of sea level rise along the California coast. (AR 18974.001, AR 18974.003.) The published draft paper, adopting the name "The Pacific Institute" under the logos of the various funding California state agencies, was released in March 2009 and entitled "*The Impacts of Sea Level Rise on the California Coast.*" (AR 18974.001.)

The report, which did not measure "worst-case sea level rise" (AR 18974.013), and subject to the caveat that "most climate models [including this one] fail to include ice-melt contributions from the Greenland and Antarctic ice sheets" (AR 18974.015 at fn. 1), concludes that "under medium to medium-high [greenhouse gas] emissions scenarios, **mean sea level along the California coast will rise** from 1.0 to 1.4 meters [**3.28 feet to 4.59 feet**] by the year 2100." (AR 18974.015.) Per the state-commissioned report, at AR 18974.017:

> "Vast areas of wetlands and other natural ecosystems are vulnerable to sea-level rise. An estimated 670 square miles, or 430,000 acres, of wetlands exist along the California coast, but additional work is needed to evaluate the extent to which these wetlands would be destroyed, degraded, or modified over time. **A sea-level rise of 1.4 m[eters] would flood approximately 150 square miles of land immediately adjacent to current wetlands, potentially creating new wetland habitat if those lands are protected from further development.**" (Emphasis added.)

Localized wetland loss due to sea rise is not difficult to calculate: "A simple method to estimate wetland loss is to compare wetland elevations to future tide elevations. If the areas are permanently inundated in the future, they will be converted to open water and lose their value as wetland habitat." (AR 18974.043-18974.044.)

In Ventura County alone, according to the report, a 1.4 meter sea level rise, in conjunction with a 100-year storm event, would jeopardize 11 miles of highways, 150 miles of roadways, ten miles of railway, five EPA-regulated hazardous materials sites, three power plants (including one immediately adjacent to the project site), nine square miles of wetlands (including those located on the SSP), and $2.2 billion of developed property and contents (in current dollars). (AR 18974.066, 18974.067, 18974.074, 18974.079, 18974.088.)

As the sea migrates inland, coastal wetlands also naturally migrate inland, but only if the adjoining inland land use is viable for wetlands migration:

> **"As sea levels rise, the entire tide regime moves upward. Wetland plants and animals have proven to be remarkably resilient, and are able to move with rising tides. However, they will not be able to move into built-up areas, where there are buildings or pavement."** (AR 12332-12333.) (Emphasis added.)

In Ventura County, having a current remaining 8.9 square miles of coastal wetlands remaining (AR 18974.080), there are only 3.4 square miles of "viable" land to accept migration, and another 2.2 square miles of developed open space or under cultivation which could accept wetlands migration if the current use terminated. (AR 18974.082, 18974.084.)

According to the conclusions of the sea level rise report, in pertinent part:

> **"Wetlands and the potential migratory paths should be protected.**
> Development should be prohibited on natural lands that are immediately adjacent to wetlands at risk. These buffer areas may be the only areas suitable for future wetland restoration projects.
>
> **Future development should be limited in areas that are at risk from rising seas.**
> In regions at risk that are not yet heavily developed, local communities and coastal planning agencies have the opportunity to limit development and reduce future threats to life and property." (Bold headings in original.)

In conformity with its report and calculations, even without modeling consideration of anticipated polar ice cap melt, the Pacific Institute drew a map placing virtually all of the SSP, much of Hueneme Road, and a substantial part of the NSP as "vulnerable to flooding" due to sea level rise. (AR 18985.) All of the Pacific Institute materials were sent to the City on March 23, 2009, more than seven months *before* issuance of the FEIR and nearly a year before its certification in March 2010. (AR 18973.)

In its "FEIR master response," seizing upon the Pacific Institute's disclaimer that it was not intended to be a FEMA document, the City simply decided to defer its analysis of sea level rise upon the proposed projects to another day:

> "[W]hile the FEIR's analysis recognizes the draft Pacific Institute report, its conclusion remains the same as that described in the RDEIR. That is, that the effects of sea level rise on coastal flooding and the associated risk to properties would be addressed through application of City development and building standards concerning the placement and construction of structures in areas prone to flooding, as established by the Federal Emergency Management Agency (FEMA) and the California Office of Emergency Services (OES). Accordingly, the impact is deemed significant but feasibly mitigated (Class II) to a less-than significant level, with reference to Mitigation Measure

GEO-5: Tsunami Emergency Evacuation, which calls for continuing implementation of ongoing commitments to early warning and evacuation under severe coastal flooding events." (AR 8154.)

"There is some indication in the research prepared by the Pacific Institute and others that **sea level rise will cause wetlands to migrate upslope into low-lying coastal areas**, including those adjacent to Ormond Beach. In the absence of a wetland restoration for the Ormond Beach area, **it is not possible to determine what the effects of the Ormond Beach projects on such a plan might be. The City assumes that, in conjunction with the development of its wetland restoration plans for the Ormond Beach area, the Coastal Conservancy will consider sea level rise as part its environmental review process**." (AR 8155.) (Emphasis added.)

The FEIR noted that the 2009 Pacific Institute report placed "all of the Southern Subarea and part of the Northern Subarea ... in a 100-year floodplain in the year 2100," which findings the City asserted to be contrary to the local FEMA and CAL EPA tsunami inundation maps. (AR 7574.)[31] Despite the findings of the RDEIR placing the expected tsunami impact across most of the SSP and extremely close to the NSP (AR 4021), after receiving the initial Pacific Institute report moving the ocean itself inland, the City's FEIR somehow moved the maximum tsunami "line" back out to somewhere in the current Ormond Beach sand. (AR 7576.) In other words, the City's position in the FEIR appears to be that as the ocean moves inland, the tsunami risk moves out to sea. (*Cf.*, AR 4021, 4022, 7574.)[32]

Prior to the City's public hearings on the FEIR, the Pacific Institute submitted a further written report to the City augmenting its 2009 report, but this time specifically addressing the proposed Ormond Beach project. The authors note that "ice is melting faster in Antarctica and Greenland than was predicted, contributing to global sea level rise about 80% higher than earlier projections." (AR 12327.) The climate change authors note that the FEIR "acknowledges that the potential risks are real, and that more study is required. However, it is insufficient under CEQA to simply state that more study is required, and push it off to an unknown future date. It is the

[31] There is no suggestion, of course, that either FEMA or Cal EPA have ever prepared flood maps for the year 2100 or any other time in the future, and the record is to the contrary (AR 12328, 12329 --FEMA coastal flood maps were "prepared in the 1980s"), rendering the City's comparative "analysis" devoid of any substantive value.

[32] Nowhere in the record is there substantial evidence of this novel geologic proposition.

lead agency's responsibility under CEQA to estimate the impacts that are likely to occur over the life of the project." (AR 12330.)

The Pacific Institute scientists further advised the City:

"There is additional research being conducted by the San Francisco Estuary Institute to determine the range of historic wetlands in southern California. Research indicates that this area was once home to an important and unique ecosystem archetype. The Plan EIR fails to consider the area within its historical ecological context....

Equivalent wetland areas of more than 500 acres (about the size of the potential restoration at Ormond Beach) does not appear again until over 200 miles north at Elkhorn Slough in Monterey County, or 90 miles south to areas near Newport Beach in Orange County. Thus, it seems that **this restoration area may hold importance not just to the local area, but for birds and wildlife of the region as a whole**." (AR 12335, 12337.)

Putting the issue in the context of this project, the scientists advised the City:

"Coastal wetlands are valuable, not just because they provide habitat for birds, fish, and other wildlife, but because they also benefit humans. Wetlands improve water quality by filtering out pollutants, reduce flooding by soaking up floodwaters, and reducing wave energy. They also take carbon out of the atmosphere and put it in the ground. Hence, wetlands are increasingly recognized for their role in helping us both mitigate and adapt to climate change.

Because most of Southern California's coastal wetland habitat has been lost, the marginal value of each acre of existing wetlands, or each acre that could be created, is very high. Areas slated for development in the Ormond Beach Specific Plan area are among the few undeveloped low-lying areas on the coast of southern California. **The Ormond Beach area appears to be on one of the few sites where wetlands will be able to migrate upslope as sea levels rise. Although sea level rise is almost certain to affect coastal wetlands and the plants and animals that live there, there is no discussion of these impacts in Section 3 of the FEIR on Biological Resources."** (AR 12332.) (Emphasis added.)

At this point, and here is where the rubber meets the road, using the 1.4 meter sea level change projected without the "polar ice cap" melt addition, the Pacific Institute submitted to the City an aerial photograph of the project site overlaying the extent of the average *daily* higher tide projection. That map shows **substantial portions of the proposed SSP industrial development underwater at some point on the average day of each year, necessarily pushing the coastal wetlands in the direction of the NSP, further migration potentially impeded by Hueneme Road and the NSP.** (AR 12334.) And, while Hueneme Road could always be removed and

relocated in the event of such migration, a fully developed NSP cannot. In response to the Pacific Institute study, the City neither submits nor cites any scientific data or substantial evidence to the contrary.[33]

In fact, the research in this record all points in the same direction, and that direction is the creation of a new paradigm in CEQA coastal land use analysis. Because global climate change and its various permutations including sea level rise is essentially a "newer" science, an EIR such as the one at issue needs to consider not only the project's immediate effect upon adjacent coastal wetlands, but the projected effect upon *expected* coastal wetlands migration over the project life. Where, as here, the effect of the NSP development and the reasonably foreseeable SSP development is to potentially eliminate the ability of the wetlands to migrate inland in concert with expected sea level rise (AR 12334), the EIR and its mitigation measures should consider the distinct possibility of complete loss of the wetlands themselves, the elimination of comparable regional migratory bird access between Newport Beach and Monterey, and, as forecast by USFWS, the taking of state and federally endangered bird species.

CEQA is intended to be the "environmental alarm bell… before [a] project has taken on overwhelming bureaucratic and financial momentum." *Vineyard Area Citizens*, *supra*, 40 Cal.4th at 441.[34] The City's stated intention in its FEIR to defer consideration of calculable sea level change impacts until individual FEMA-compliant building permits and the possible future acquisition of part of the portions of the SSP by the CSCC (AR 8155) is a complete abdication of the City's responsibilities under CEQA to "inform the public and its responsible officials of the

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[33] The National Oceanographic and Atmospheric administration defines "mean higher high water" as the "average higher high water height of *each* tidal day."
http://tidesandcurrents.noaa.gov/datum_options.html
This, of course, means that many, many days of the year the highest tide will exceed the average depicted at AR 12334.

[34] From a bureaucratic perspective, not wanting to recirculate the EIR yet again is understandable. The City had already recirculated its EIR once, in principal part perhaps to salvage its other CEQA projects in light of an adverse finding in the 2008 DEIR of insufficient domestic water availability. Having dodged that bullet, at some point after the many years of preparation and re-preparation, city planning understandably wanted this EIR off its desks in the hope that it would never return.

environmental consequences of their decisions *before* they are made." *Save Tara v. City of West Hollywood* (2007) 147 Cal.App.4th 1091, 1006. (Italics added.)

Petitioners contend, correctly (POB 45-46, PRB 38-45), that the 2009 Pacific Institute report as explained locally in its December 8, 2009 letter to the City was "significant new information" that mandated revision and recirculation of the EIR. The new information that the *average* daily highest tide during the life of the project ought to be expected to inundate the SSP, cause the NSP to restrict potential coastal wetlands migration, and eventually push the beach to and presumably beyond Hueneme Road, is legally analogous to the situation that occurred in *Mira Monte Homeowners Ass'n v. County of Ventura* (1985) 165 Cal.App.3d 357 [per, Abbe, J.] (cited with approval in *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1131-1132.). In *Mira Monte*, after FEIR publication but four days before certification by the county, it was discovered that the proposed development "protruded" into adjacent wetlands "approximately a quarter of an acre greater than previously thought."

The Court of Appeal in *Mira Monte* ordered the County's certification of the EIR set aside:

> "[T]he failure to prepare a subsequent or supplemental EIR deprived the public, who relied on the EIR's representations, of meaningful participation regarding the issue of wetland degradation. In reviewing an EIR, a paramount consideration is the right of the public to be informed in such a way that it can intelligently weigh the environmental consequences of any contemplated action and have an appropriate voice in the formulation of any decision." [Citation.] "Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal's benefit against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal . . . and weigh other alternatives in the balance. ..."

In *Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455, relied upon heavily by both NSP and SSP real parties here, the City of Los Angeles rejected the Pacific Institute sea level rise findings in favor of the report of a local civil engineer. (*Id.*, at 472.) The reporting engineer noted that the project site in *Ballona Wetlands Land Trust* was "two miles from the ocean ..., failed to account for elevated land between the project site and the coastline that would act as a barrier, and failed to account for the topography of the project site and building elevations." (*Id.*) In this case, not only is there no competing engineering opinion

upon which the City could assert substantial evidence[35] , the only evidence presented is that the Ormond Beach topography is "low-lying" and particularly susceptible to tidal flow (AR 12332), unlike the proposed upgradient construction in *Ballona Wetlands Land Trust.*

The appellate court in *Ballona Wetlands Land Trust* supports its conclusions with the catchy phrase: "the purpose of an EIR is to identify the significant effects of a project on the environment, not the significant effects of the environment on the project" (201 Cal.App.4th at 473), citing two public health cases. If this were indeed the rule as applied in the cited cases, the City here should not have been concerned at all with tsunami impacts resulting in required emergency response mitigation measures (AR 4036-4037), or jet engine noise from Pt. Mugu resulting in imposed mitigation here of double-paned windows and air conditioning at the beach (AR 8039).

An integral part of EIR analysis, however, is land use compatibility (see, *e.g.*, *City of Santee v. County of San Diego*, 214 Cal.App.3d 1438, 1443), and compatibility is a two-way street. It is inconceivable that the *Ballona Wetlands Land Trust* court is suggesting that the public has no right to know if a CEQA project is being placed directly upon a known seismic fault; or in the path of a projected tsunami; or in the middle of an abandoned toxic waste dump.[36]

But even if one disregards environmental setting for purposes of land use compatibility, here the only substantial evidence in the record establishes that this project may have significant adverse consequences on the proper inland *migration* of coastal wetlands and related biota (AR 12334). This is *not* an issue discussed in the *Ballona Wetlands* decision and it involves "the significant effects of the NSP project on the environment," not the "significant effects of the environment on the NSP." Beyond the potential ultimate loss of wetlands, as the coastal wetland

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[35] "[S]ubstantial evidence includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact." (Pub. Res.C.§ 21080, subd. (e)(1).)

[36] Taken to its logical extreme, since residential and commercial development has no impact upon seismic activity, only vice versa, cases such as *Oakland Heritage Alliance v. City of Oakland*, (2010) 195 Cal.App.4th 884 have no business being discussed in the same breath as CEQA. If buildings can be destroyed in an earthquake, they can just as easily be swept away by the ocean tide.

moves inland toward the NSP, the previously studied effects of the NSP project upon those wetlands will presumably likewise be exacerbated. (AR 12334.)

Here, the public and the City decision makers had a right to be informed of the expected location of average daily high tide over the life of this project (or at least within a scientifically expected range of average daily high tide), subject to the possible loss of the coastal wetlands entirely, because the wetlands will conceivably at some point have no further room to migrate in light of the construction and development of the NSP. (AR 12334.) The failure of the City to analyze this scientific information, assess its potential significance, and to develop the appropriate mitigation measures in the event of project approval, compels setting aside the approved NSP entitlements pending an adequate publicly circulated environmental review. *Mira Monte Homeowners Ass'n v. County of Ventura, supra*, 165 Cal.App.3d 357.

Nor is it appropriate under CEQA for the City on remand to fail to estimate the additional expected impacts of polar ice cap melt upon the already expected calculated sea level rise in relation to the project. In *Citizens to Preserve the Ojai v. County of Ventura* (1985) 176 Cal. App. 3d 421 [per Abbe, J.], expansion of an on-shore oil refinery used an available air quality model in considering cumulative air quality impacts, but the model did not consider all emissions: "[T]he model did not quantify the potential impact of outer continental shelf emissions on Ventura County's air quality. ...The AQMP explained that a verified, functional photochemical model for assessing onshore impact of offshore emissions was then unavailable and development of one was not expected for several years." (176 Cal.App.3d at 427.)

Reversing the ruling of the trial judge and voiding certification of the EIR, the Court of Appeal in *Citizens to Preserve the Ojai v. County of Ventura* concluded, in pertinent part:

> "[A]ssuming a sophisticated technical analysis was not feasible, if some reasonable, albeit less exacting, analysis of the onshore impact of outer continental emissions could be performed, the County was required to do so and report the results. Furthermore, if a less exacting analysis yielded facts indicating the cumulative impact of outer continental shelf emissions was not significant, the EIR was required to at least briefly state and explain such conclusion." (176 Cal.App.3d at 432.)

Accordingly, on remand the City will need to not only augment the daily higher mean flow rendering modeled by Pacific Institute with further analysis and estimation of

accompanying coastal wetlands migration, but also should attempt to forecast the added cumulative impact of expected polar ice cap melt upon sea level rise at this particular project site.

6. The City's Responses to Comments are Inadequate with Respect to Mitigation of Significant Biological Impacts

On the RDEIR, the City responded to comments from 60 agencies, groups and individuals, which the City broke down into 497 "discrete comments.[37] Petitioners generically argue that the City's written responses are inadequate (POB, at 47-48), which this Court will not address as to all 497 responses, as petitioners make no effort to identify any particular alleged deficiency, other than three "examples." (POB, at 47-49; PRB, at 46-47).

Petitioners' first example relates to issues regarding the adequacy of the proposed biological mitigation funding. Per the City's response to comments: "The commentor expressed concern that the fiscal amounts identified within the Development Agreements for funding the NMRP may not be sufficient. This concern will be forwarded to the appropriate decision-makers for review and consideration." (AR 8179.)

"In the course of preparing a final EIR, the lead agency must evaluate and respond to comments relating to significant environmental issues. In particular, the lead agency must explain in detail its reasons for rejecting suggestions and proceeding with the project despite its environmental effects. **There must be good faith, reasoned analysis in response [to the comments received.]** *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 940, 945. (Emphasis added.)

The City, by sloughing off analysis of any nexus between the proposed impact mitigation fee and the cost of reducing significant biological impacts to levels of insignificance, in favor of what appears to be later "back room" negotiation, is further symptomatic of the quicksand of CEQA mitigation deferral. The development agreement here, mandating that "[t]he annual combined contribution of the Projects shall be $190,000" by contingent financing district *before*

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[37] See fn. 14, *ante*.

the OBNRMP setting up the paid-for mitigation standards has ever been prepared (AR 428), as indicated earlier, is legally deficient in terms of CEQA mitigation protocol. The City's response to comments that the "concern will be forwarded to the appropriate decision-makers for [future] review and consideration" is not the "good faith, reasoned analysis" required by law.

Petitioners also take issue with a response to comments where the FEIR noted that there are no local programs providing for offsite agricultural land-loss mitigation. (7909-7910, 7912-7913.) Petitioners commented that CSCC is "interested in conserving agricultural acreage within the Study Area" (AR 8343), as to which the City correctly replied that its FEIR observation regarding lack of *local* program unavailability was "accurate." (AR 8313.)

CSCC did not object to or even discuss agricultural land-loss mitigation in its lengthy written response to the RDEIR. (AR 8181-8191.) CSCC's proposed (and completely disregarded) alternative of creating "an adequate upland-grassland buffer to accommodate the inland extent of tidal wetlands that ...inevitably would establish by inland migration as sea level rises" (AR 8180, 8190) is proposed biological, not agricultural, mitigation. As it relates to agricultural impact mitigation, the City's response to comments did not preclude "informed decision making and informed public participation." (See generally, *Rialto Citizens for Responsible Growth v. City of Rialto*, *supra*, 208 Cal.App.4th at 925.)

Petitioners also challenge the City's failure to embrace the evolving science of GHG emissions in its response to comments. (POB 47, PRB 48-49.) As stated earlier, the City's failure to reasonably attempt to model the project's cumulative impacts upon global GHG emission concerns in its March 2008 RDEIR falls within the "safe harbor" of the pre-December 30, 2009 release of CEQA guidelines designed to calculate and determine the significance of greenhouse gas emissions, as held in *Rialto Citizens for Responsible Growth v. City of Rialto*, *supra*, 208 Cal.App.4th at 940, and to which this Court is bound.

7. The City's Mitigation Infeasibility Findings as to Agricultural and Visual Resource Impacts are Adequate under CEQA

Petitioners contend that it was improper under CEQA for the City to find that unavoidable significant impacts to loss of agricultural land and unavoidable significant impacts

to visual resources could not be mitigated. (POB 49-53, PRB 48-50.) In support of this claim, petitioners focus exclusively to CSCC "interest" in the project area. (POB 52-53.) As indicated in the previous discussion, nowhere does CSCC at the time of the RDEIR express "interest" in putting unimproved land into agriculture as mitigation; and nowhere does CSCC discuss contributing some way to mitigate the project's impacts upon existing visual resources. (AR 8181-8191.)

8. The NSP Is Not, on Its Face, Inconsistent with the City's General Plan

Petitioners' final argument, made outside the context of CEQA, is that the City's 2011 NSP specific plan approval is inconsistent with the City's general plan. (POB 54-57, PRB 50-53.) Under the Planning and Zoning Law, cities are required to adopt a comprehensive, long-term general plan for their physical development. (Gov. Code, § 65300.) A general plan must contain (1) a statement of development polices; (2) text setting forth objectives, principles, standards and plan proposals; and (3) elements addressing land use, circulation, conservation, housing, noise, safety and open space. (Gov. Code, § 65302.)

General plans have been characterized as the "constitution" or "charter" for future development situated at the top of the hierarchy of local government law regulating land use. (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 772-773; *Pfeiffer v. City of Sunnyvale City Council* (2011) 200 Cal.App.4th 1552, 1562.) In this role, a general plan sets forth a city's fundamental policy decisions about future development. (*Pfeiffer v. City of Sunnyvale City Council*, *supra*, 200 Cal.App.4th at p. 1562.)

The propriety of nearly every local decision affecting land use and development depends on consistency with the applicable general plan and its elements. (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 570.) The consistency doctrine is the linchpin of California's land use and development laws because it gives the force of law to the plans for growth set out in the general plan. (*California Native Plant Society v. City of Rancho Cordova*, (2009) 172 Cal.App.4th 603, 636.)

When a public decision concerns a proposed project's consistency with a general plan, the arbitrary and capricious standard of review applies. (*California Native Plant Society v. City of Rancho Cordova*, *supra*, 172 Cal.App.4th at 636.) In particular, courts inquire "'whether the decision is arbitrary, capricious, entirely lacking in evidentiary support, unlawful, or procedurally unfair.'" (*Id.*) The requirement of evidentiary support is essentially the same as the substantial evidence test. Both ask whether a reasonable person could have reached the same conclusion on the evidence. (*Id.*, at 637.)

When addressing a claim of inconsistency between a project and a general plan, courts must keep in mind the deferential nature of their review. (*California Native Plant Society v. City of Rancho Cordova*, *supra*, 172 Cal.App.4th at p. 638.) Courts do not substitute their judgment for that of a local agency in making a determination of consistency. Rather, the agency's determination comes to the court with a strong presumption of regularity. (*Id.*) "Thus, as long as the City reasonably could have made a determination of consistency, the City's decision must be upheld, regardless of whether we would have made that determination in the first instance." (*Id.*)

Specifically, petitioners rely upon policy C.2 of the open space and conservation element of the City's general plan, which states: "The City should encourage the preservation and enhancement of the wetlands in the Ormond Beach and Mugu lagoon." (AR 8340.) Petitioners also cite objective 1 of the open space and conservation element of the City's general plan, which is designed to "[p]rotect unique biological habitats from development." (*Id.*)

Here, the NSP specific plan development is proposed to be built *outside* the current (*i.e*, pre-migration) wetlands, and the NSP specific plan approval is contingent upon required offsite mitigation (albeit deferred under a CEQA analysis, *supra*) with respect to the wetlands. (AR 648-651.) As to offsite impacts, the specific plan acknowledges the need to mandate specific "plant palettes [to] exclude invasive species that could have downstream impacts on riparian habitat, wetlands, and beaches and dunes." (AR 12713.) Further as to offsite impacts, the specific plan notes the requirement in the development agreement of an OBNRMP (albeit contingent in the agreement itself). (AR 12731.) The NSP specific plan approval is further contingent upon required *on* site mitigation through a variety of bird surveys and an "adaptive management plan," a draft of which is attached as exhibit "D" to the specific plan. (AR 642-648; 12738-12786.)

Based upon this record, and under the appropriate review standards of the Planning and Zoning Law outside the mandates of CEQA, a "reasonable person" could conclude that the NSP specific plan is inconsistent with the City's general plan. This analysis, of course, does nothing to remediate the City's need to fully comply with CEQA as condition precedent to approval of that NSP specific plan.

Order on Remand

A peremptory writ of mandate shall issue, setting aside all NSP entitlements premised upon the FEIR; and setting aside the City's certification of the FEIR. The City needs to redraft and recirculate for review and comment a "focused" EIR which incorporates the following items:

- The City's CEQA project description needs to be revised to disclose the "true" NSP project, consisting of 1545 units; particularly as it compels revision of calculations as to domestic water availability during the life of the NSP project;
- The environmental setting needs to be augmented to analyze scientifically expected sea level rise during the life of the NSP project; identifying the breadth of expected wetlands migration over time and, if appropriate, related findings of significance of the impact of the project upon such wetlands migration over time;
- To the extent the NSP project stands directly or even partly in the path of expected wetlands migration, the mitigation necessary to ameliorate the loss of the Ormond Beach coastal wetlands and the associated loss of the various federal and state sensitive and endangered species, and its loss of use as both a local and migratory avian habitat and refuge;
- To the extent coastal wetlands migration does not otherwise envelop the NSP project area, the impact of the project upon Ormond Beach coastal wetlands coming in far closer proximity due to scientifically expected sea level rise during the project life;
- The effect of scientifically expected sea level rise upon flooding risks to the NSP over the life of the project beyond the daily higher mean tide; and associated mitigation relating to extraordinary flooding of the NSP development from sea waters beyond the daily higher mean tide, including risks of erosion, infrastructure damage including loss of Hueneme Road, loss of electricity from the Ormond Beach power plant, ocean

flood drainage issues, loss of life and property damage due to flooding, and tsunami risk potential;

- The complete revision of the biological resources component of the FEIR, beginning with current biological/botanical surveys on- and offsite (and/or the equivalent in recent literature over the last five years) using industry-appropriate standards in order to properly assess a biological baseline before biological mitigation measures are contemplated;
- Inclusion within the focused EIR of all on-site and offsite biological mitigation associated with the project, including but not limited to mitigation associated with project impacts upon scientifically expected sea level rise and related wetlands migration, using objective criteria without deferral to vague future "plans" or contingent financing districts or unrelated other potential future projects; and
- Estimation and quantification of additional risk potential on all of the above due to the impacts of scientifically expected polar ice cap melt over the life of the project.

In the concluding admonition in *Vineyard Area Citizens*, the Supreme Court writes:

> "The preparation and circulation of an EIR is more than a set of technical hurdles for agencies and developers to overcome. **The EIR's function is to ensure that government officials who decide to build or approve a project do so with a full understanding of the environmental consequences and, equally important, that the public is assured those consequences have been taken into account.** [Citation.] For the EIR to serve these goals it must present information in such a manner that the foreseeable impacts of pursuing the project can actually be understood and weighed, and the public must be given an adequate opportunity to comment on that presentation before the decision to go forward is made." (*Vineyard Area Citizens*, supra, 40 Cal.4th at p. 449-450.) (Emphasis added.)

The purpose of the focused EIR mandated here is to accomplish exactly that goal. If the City's approval of the NSP, based upon the FEIR, will foreclose expected wetlands migration and effectively become the cause of loss or partial loss of the Ormond Beach wetlands, the city council needs to understand and appreciate that impact, and the public needs to be assured that the three members of the city council voting for this project did so with full knowledge of that expectation and intention.

Under Public Resources Code §21168.9(b), this Court will retain jurisdiction over the City's proceedings by way of a return to this peremptory writ of mandate until the Court has determined that the City has complied with CEQA. The City must file a return to this writ no later than December 20, 2012.

Costs to petitioners.

Dated: October 15, 2012

Glen M. Reiser
Judge of the Superior Court